

EXHIBIT “19”

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MICHAEL W. WEBB, SBN 133414
City Attorney for the
City of Redondo Beach
415 Diamond Street
Redondo Beach, CA
90277-0639

Phone: (310) 318-0655
Fax: (310) 372-0167

Attorney for THE CITY
OF REDONDO BEACH

STATE OF CALIFORNIA
REGIONAL WATER RESOURCES CONTROL BOARD
LOS ANGELES REGION

In the Matter of)
ADMINISTRATIVE CIVIL LIABILITY) **OBJECTIONS RELATED TO PUBLIC**
COMPLAINT R4-2008-0058-M ISSUED) **HEARING RE: ADMINISTRATIVE CIVIL**
TO THE CITY OF REDONDO BEACH BY) **LIABILITY COMPLAINT NO. R4-2008-**
CALIFORNIA REGIONAL WATER) **0058-M**
QUALITY BOARD, LOS ANGELES) Date: May 17, 2010
REGION, REGARDING SEASIDE) Time: 10:00 p.m.
LAGOON) Place: 320 W. 4th Street
Los Angeles, CA 90013

I.
INTRODUCTION

The City of Redondo Beach (the "City") respectfully submits these objections pursuant to Section VIII(c) of the Notice of Public Hearing dated February 16, 2010. Because these objections raise serious impingements upon the City's due process right, the City requests Administrative Civil Liability Complaint No. R4-2008-0058-M be withdrawn.

III.
OBJECTIONS

A. THE REGIONAL BOARD HAS NOT MET DUE PROCESS REQUIREMENTS IN THIS MATTER

The City of Redondo Beach has an absolute right to due process. This right is guaranteed

1 by both the federal and state constitutions. *See* U.S. Const. Amend. XIV (“nor shall any State
2 deprive any person of life, liberty, or property, without due process of law”); Cal. Const. Art. I, §
3 7(a) (“A person may not be deprived of life, liberty, or property without due process of law . . .”).

4 ““Due process is flexible and calls for such procedural protections as the particular situation
5 demands.’ [Citation.] Accordingly, resolution of the issue whether the administrative procedures
6 provided . . . are constitutionally sufficient requires analysis of the governmental and private
7 interests that are affected.” *Machado v. State Water Res. Control Bd.*, 90 Cal. App. 4th 720, 725
8 (2001). “[I]dentification of the specific dictates of due process generally requires consideration of
9 three distinct factors.” *Id.* Those factors are:

10 [1]) the private interest that will be affected by the official action;

11 [2]) the risk of an erroneous deprivation of such interest through the procedures
12 used, and the probable value, if any, of additional or substitute procedural
safeguards; and

13 [3]) the Government’s interest, including the function involved and the fiscal and
14 administrative burdens that the additional or substitute procedural requirement
would entail.

15 *Id.* at 725-26 (quoting *Mathews v. Eldridge* 424 U.S. 319, 334-335 (1976)). There are at least
16 two issues that have arisen during the course of this matter that indicate the Regional Board has
17 not fulfilled its due process duties.

18 **1. The Regional Board Has Not Made Its File for This Matter Available to the**
19 **City as of April 18, 2010**

20 The California Supreme Court has held that to comport with the standards of due process,
21 “(a) hearing requires that the party be apprised of the evidence against him so that he may have an
22 opportunity to refute, test, and explain it, and the requirement of a hearing necessarily
23 contemplates a decision in light of the evidence there introduced.” *English v. City of Long Beach*,
24 35 Cal. 2d 155, 159 (1950) (citing *La Prade v. Dep’t of Water & Power*, 27 Cal.2d 47, 52(1945);
25 *Universal Cons. Oil Co. v. Byram*, 25 Cal.2d 353 (1944)).

26 The Notice of Public Hearing regarding the hearing for this matter states that, as of
27 February 16, 2010, “[t]he ACLC, related documents, proposed order, comments received, and
28 other information about the subject of the ACLC *are available for inspection* between the hours of

1 8:00 a.m. and 5:00 p.m”¹ (“Notice of Public Hearing” dated February 16, 2010, at 2,
2 attached as Exhibit “1”) (italics added). But the documents were not available on February 16,
3 2010, nor were they available at a reasonable time thereafter.

4 On March 29, 2010, the City received the Binder from the Regional Board’s Prosecution
5 team. Within five days of receiving the Binder, the City had evaluated it. Next, the City
6 attempted to contact the Regional Board to schedule a review of the Prosecution File. Because the
7 City could not compare the Prosecution File to the Binder until after receipt and review of the
8 Binder, reviewing the prosecution file before March 29, 2010, would have been premature and,
9 eventually, duplicative.

10 Specifically, the City called, emailed, and faxed the Regional Board on a relatively
11 consistent basis from April 1 through April 15, 2010, trying to set up a review of the Prosecution
12 File. (See Declaration of Justus J. Britt, attached hereto as Exhibit “2”). On April 6, 2010, the
13 City was told that the Regional Board had not compiled the Prosecution File, and that the City
14 would have to fax a request to the Regional Board to initiate that process (which the City did that
15 day). (*Id.* at 2, ¶¶ 5-6). The City persisted with multiple follow up communications, and was
16 finally told (on Thursday, April 15, 2010, at 1:54 p.m.) that the Prosecution File was compiled and
17 ready for review. (*Id.* at 2, ¶ 12). The City was also informed at that time the staff member that
18 was going to facilitate the review would be leaving the office at 3:45 p.m. that day, and the
19 Regional Board would be closed on April 16, 2010. (*Id.* at 2-3, ¶ 12). Thus, practically speaking,
20 the Regional Board informed the City that the first time the City would be allowed to see the
21 Prosecution File was at 9:00 a.m. on **Monday, April 19, 2010**. The deadline set for submitting
22 this brief itself is 5:00 p.m. **later that same day** on Monday, April 19, 2010.

23 The Notice of Public Hearing clearly states that “the entire file [i.e., the Prosecution File]
24 will become a part of the administrative record of this proceeding.” (Exhibit “1” at 2). And yet,
25 the Regional Board effectively prevented the City from reviewing the Prosecution File. Failing to
26 provide access to the Prosecution File in a timely manner has prevented the City from having a
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¹ These documents are collectively referred to as the “Prosecution File” herein.

1 true and meaningful chance to rebut evidence. Because the City has a right to rebut evidence
2 pursuant to Government Code section 11425.10(a)(1), the Regional Board's failure to allow
3 review violates the City's rights under section 11425.10(a)(1) and its other due process rights that
4 ensure a fair hearing.

5 **2. The Regional Board's Hearing Procedures Do Not Include Cross-Examination**

6 Code of Regulations title 23, section 648.5 indicates that an adjudicative proceeding
7 before the Regional Board should include "[c]ross-examination of parties' witnesses by other
8 parties[.]" Cal. Code Regs. tit. 23, § 648.5(a)(6). The "Hearing Procedures" outline for this
9 matter, however, *fails to include the right to cross-examination*. (Exhibit "1" at 4). Somewhat
10 strangely, the paragraph following the "Hearing Procedures" states the "Hearing Panel does not
11 generally require the cross examination of witness" as if that was a burden, not a statutory right.
12 (*Id.*).

13 Government Code section 11513 expressly states that each party to an administrative
14 adjudication "shall have [the right] to cross-examine opposing witnesses on any matter relevant to
15 the issues." Section 11513 is expressly applicable to an adjudicative proceeding before the
16 Regional Board. Cal. Code Regs. tit. 23, § 648(b). "While administrative bodies are not expected
17 to observe meticulously all of the rules of evidence applicable to a court trial, common sense and
18 fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be
19 determined . . . [C]ross-examination within reasonable limits must be allowed." *Desert Turf*
20 *Club v. Bd. of Supervisors*, 141 Cal. App. 2d 446, 455 (1956). This is particularly true in this case
21 where the Regional Board has the burden to show that its more than three year delay (almost
22 seven years for some of the alleged violations) was reasonable and yet has offered only
23 perfunctory statements regarding "limited enforcement resources and competing priorities." The
24 City's right to cross-examination provides the best opportunity to challenge the factual basis of
25 those statements.

26 **3. Application of the *Mathews* Factors**

27 Rather than applying the *Mathews* factors individually to each of the two due process
28 issues discussed above, brevity will be served by addressing them together. The first *Mathews*

1 factor turns on if there is a private interest that will be affected by the official action. *Mathews*,
2 424 U.S. at 334-335. That interest is the same for both issues: official action by the Regional
3 Board will, via the imposition of ACL, have a direct impact on what is obviously an important
4 “private interest:” the City’s finances and ability to meets its obligations. *Machado* implicitly
5 suggests that “civil penalties” that “affect the fundamental nature of [one’s] business” tends to
6 weigh in favor of finding a due process violation occurred. *See Machado*, 90 Cal. App. 4th at
7 725. The second *Mathews* factor has two elements: 1) what is at risk if the alleged impropriety
8 is not addressed, and 2) the “probable value . . . of additional or substitute procedural
9 safeguards[.]” *Mathews*, 424 U.S. at 334-335. As to the risk at issue, the City obviously risks the
10 unfair imposition of ACL, and, accordingly, the loss of money. It is clear that the probable value
11 of procedural safeguards is high: providing notice of the evidence against the City and the ability
12 to cross-examine are fundamental to the City’s ability to receive a fair hearing. The due process
13 violations that have occurred in this case can be avoided in the future simply by following the law
14 and the Regional Board’s own written policies. Thus, the second *Mathews* factor weighs heavily
15 in favor of finding due process requirements have not been met here.

16 Finally, the third *Mathews* factor looks at the government’s interest in the function at issue
17 and any the “fiscal and administrative burdens that the additional or substitute procedural
18 requirement would entail.” *Id.* To address the due process concerns raised herein in the future,
19 the Regional Board will need only to actually follow its existing policies. There is no justification
20 for failing to provide access to the Prosecution File. The Regional Board’s written policies clearly
21 assume that point to be true. Additionally, there is no stated justification for failing to follow the
22 relevant regulatory provisions for allowing cross-examination. The costs involved in taking the
23 proposed actions are minimal.

24 III.

25 CONCLUSION

26 At this point the only effective remedy for the due process violations committed by
27 Regional Board staff is withdrawal of the Complaint in its entirety. California Water Code section
28 13323(b) provides that the City has a right to a hearing within ninety days after being served with

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a complaint. The City also has the right be apprised of the evidence against it so that it may have an opportunity to refute, test, and explain it in order to have a fair hearing. The Regional Board can not force the City to choose between these two rights. Yet by denying the City access to the Prosecution File until the very same day that the City's written materials were due to the Regional Board, the Regional Board has put the City in that very position. A delay in the hearing will violate the City's right to a speedy hearing within the ninety days set forth in section 13323(b). Proceeding on the current schedule, however, will not provide a full and fair hearing to the City based on the Regional Board's failure to follow the law and its own procedures for making the Prosecution File available to the City.

Thus, withdrawal of the Complaint in its entirety is now the only effective remedy for the due process violations. Alternatively, if the Regional Board is not inclined to withdraw this matter altogether, due process certainly requires the Regional Board's prosecution team be barred from using as evidence any documents in the file "containing the ACLC, related documents, proposed order, comments received, and other information about the subject of the ACLC," in other words the "entire file that was to become a part of the administrative record of this proceeding." Additionally, cross-examination should be permitted for any evidence that the Prosecution does produce as evidence.

Dated: April 19, 2010



Michael W. Webb,
Attorney for the City of Redondo Beach

EXHIBIT 1

HEARING PANEL OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD LOS ANGELES REGION

320 W. 4th Street, Suite 200 Los Angeles, California 90013 (213) 576-6600

ACLC R4-2008-0058-M

NOTICE OF PUBLIC HEARING

TO CONSIDER AN ADMINISTRATIVE CIVIL LIABILITY COMPLAINT AND PROPOSE RECOMMENDATIONS

Table with 3 columns: DISCHARGER, DISCHARGE LOCATION, RECEIVING WATERS. Row 1: City of Redondo Beach, Seaside Lagoon 200 Portofino Way, King Harbor

Administrative Civil Liability Complaint ("ACLC") No. R4-2008-0058-M alleges that the City of Redondo Beach violated Order Nos. 99-057 and R4-2005-0016 by failing to comply with the effluent limits during the period June 2002 through July 2008. During this time, seventeen (17) effluent limit violations of Order No. 99-057 and thirty-eight (38) effluent limit violations of Order No. R4-2006-0053 were noted in the Permittee's self-monitoring reports. Out of the fifty-five effluent limit violations, fifty (50) are subject to mandatory minimum penalties. As stated in the ACLC, Regional Board staff, represented by the Regional Board Staff Prosecution Team (Prosecution Team), recommends that a penalty of \$150,000 be assessed against the City of Redondo Beach for the violations.

Pursuant to Water Code section 13228.14, a Hearing Panel consisting of three members of the California Regional Water Quality Control Board, Los Angeles Region ("Regional Board") will convene a hearing to hear evidence, determine facts, and to propose a recommendation to the Regional Board about resolution of the ACLC.

This notice sets forth procedures to be used by hearing panels of the Regional Board and outlines the process to be used at this hearing.

I. HEARING DATE AND LOCATION

- Date: May 17, 2010
Time: 10:00 A.M.
Place: 320 W. 4th Street
Los Angeles, CA 90013
• Room location TBD

II. AVAILABILITY OF DOCUMENTS

The ACLC, related documents, proposed order, comments received, and other information about the subject of the ACLC are available for inspection and copying between the hours of 8:00 a.m. and 5:00 p.m. at the following address:

California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Arrangements for file review and/or copies of the documents may be made by calling the Los Angeles Regional Board at (213) 576-6600.

The entire file will become a part of the administrative record of this proceeding, irrespective of whether individual documents are specifically referenced during the hearing. However, the entire file might not be available at the hearing. Should any parties or interested persons desire that the Prosecution Team bring to the hearing any particular documents that are not included in the Hearing Panel binder, they must submit a written or electronic request to the Prosecution Team during business hours, not later than April 27, 2010. The request must identify the documents with enough specificity for the Prosecution Team to locate them. (Documents in the Hearing Panel binder will be present at the hearing.)

III. NATURE OF HEARING

This will be a formal adjudicative hearing pursuant to section 648 et seq. of title 23 of the California Code of Regulations. Chapter 5 of the California Administrative Procedure Act (commencing with section 11500 of the Government Code) relating to formal adjudicative hearings does not apply to adjudicative hearings before the Regional Board, except as otherwise specified in the above-referenced regulations.

IV. PARTIES TO THE HEARING

The following are the parties to this proceeding:

1. City of Redondo Beach
2. Regional Board Staff Prosecution Team

All other persons who wish to participate in the hearing as a designated party shall request party status by submitting a written or electronic request to the Legal Advisor to the Hearing Panel identified in section VIII below no later than April 5, 2010. The request shall include a statement explaining the reasons for their request (e.g., how the issues to be addressed in the hearing and the potential actions by the Regional Board affect the person), and a statement explaining why the party

or parties designated above do not adequately represent the person's interest. The requesting party will be notified before the hearing whether the request is granted. All parties will be notified if other persons are so designated.

V. COMMUNICATIONS WITH THE PROSECUTION TEAM

The California Administrative Procedure Act requires the Regional Board to separate prosecutorial and adjudicative functions in matters that are prosecutorial in nature. A Prosecution Team, comprised of the Regional Board enforcement and other staff, will serve as the complainant in the proceedings and is a designated party. The Case Manager over this matter, who will coordinate the efforts of the Prosecution Team, is Russ Colby, Environmental Scientist. Mayumi Okamoto, Staff Counsel from the State Water Resources Control Board's Office of Enforcement will advise the Prosecution Team prior to and at the panel hearing. Neither Ms. Okamoto nor the members of the Prosecution Team will be advising the Regional Board in this matter or have engaged in any substantive conversations regarding the issues involved in this proceeding with any of the Board Members or the advisors to the hearing panel (identified below).

Any communication with the Prosecution Team prior to the hearing should be directed to the Case Manager:

Russ Colby
320 W. 4th Street, Suite 200
Los Angeles, CA 90013
(213) 620-6369
rcolby@waterboards.ca.gov

VI. PUBLIC COMMENTS AND SUBMITTAL OF EVIDENCE

A. Submittals By Parties.

Not later than **March 26, 2010**, the Prosecution Team will send the parties a preliminary Hearing Panel binder containing the most pertinent documents related to this proceeding and a PowerPoint presentation, which summarizes the evidence and testimony that the Prosecution Team will present and rely upon at the hearing.

The City of Redondo Beach is required to submit:

- 1) Any additional documents or evidence the Party wants the Hearing Panel to consider,
- 2) A summary of any testimony the Party intends to present, and
- 3) A statement regarding how much time the Party needs to present the case

to the attention of the Case Manager of the Prosecution Team (as identified above) and other designated parties no later than 5:00pm on **April 19, 2010**. The Prosecution Team shall have the right to present additional evidence in rebuttal of matters submitted by any other party.

The Prosecution Team will send to the Hearing Panel and the parties a final Hearing Panel binder no later than **May 6, 2010**.

B. Submittals By Interested Persons.

Persons who are not designated as parties, above, that wish to comment upon or object to the proposed ACLC, or submit evidence for the Hearing Panel to consider, are invited to submit them in writing to the Prosecution Team (as identified above). To be evaluated and responded to by Prosecution Team, included in the final Hearing Panel binder, and fully considered by the Hearing Panel in advance of the hearing, any such written materials must be received no later than **March 18, 2010**. If possible, please submit written comments in Word format electronically to mmerino@waterboards.ca.gov. Interested persons should be aware the Regional Board is entitled to settle this matter without further notice, and therefore a timely submittal by this date may be the only opportunity to comment upon the subject of this ACLC. If the hearing proceeds as scheduled, the Hearing Panel will also receive oral comments from any person during the hearing (see below).

VII. HEARING PROCEDURES

Adjudicative proceedings before the Hearing Panel generally will be conducted in the following order:

- Opening statement by Hearing Panel Chair
- Administration of oath to persons who intend to testify
- Prosecution Team presentation
- Discharger presentation
- Designated parties' presentation (if applicable)
- Interested persons' comments
- Prosecution Team rebuttal
- Questions from Hearing Panel
- Deliberations (in open or closed session)
- Announcement of recommendation to the Regional Board

While this is a formal administrative proceeding, the Hearing Panel does not generally require the cross examination of witness, or other procedures not specified in this notice, that might typically be expected of parties in a courtroom.

Parties will be advised by the Hearing Panel after the receipt of public comments, but prior to the date of the hearing, of the amount of time each party will be allocated for presentations. That decision will be based upon the complexity and the number of issues under consideration, the extent to which the parties have coordinated, the number of parties and interested persons anticipated, and the time available for the hearing. The parties should contact the Case Manager not later than **April 19, 2010** to state how much time they believe is necessary for their presentations (see Section VI. A above). It is the Regional Board's intent that reasonable requests be accommodated.

Interested persons are invited to attend the hearing and present oral comments. Interested persons may be limited to approximately five (5) minutes each, for their presentations, in the discretion of the Chair, depending on the number of persons wishing to be heard. Persons with similar concerns or opinions are encouraged to choose one representative to speak.

For accuracy of the record, all important testimony should be in writing, and delivered as set forth above. The Hearing Panel will include in the administrative record written transcriptions of oral testimony or comments made at the hearing.

VIII. COMMUNICATIONS WITH THE HEARING PANEL

A. Ex Parte Communications Prohibited.

As an adjudicative proceeding, Regional Board members and their advisors may not discuss the subject of this hearing with any person, except during the public hearing itself, except in the limited circumstances and manner described in this notice. Any communications to the Regional Board, Hearing Panel, or Hearing Panel Advisors before the hearing must also be copied to the Prosecution Team and other Party(ies), as identified above.

B. Hearing Panel Advisors.

The Hearing Panel will be advised before and during the hearing by Executive Officer Tracy Egoscue, and a Legal Advisor, Michael Levy, Senior Staff Counsel for the Regional Board. While Ms. Egoscue exercises general oversight over the staff's enforcement activities, neither she nor Mr. Levy have exercised any authority or discretion over the Prosecution Team, or advised them with respect to this matter.

C. Objections to manner of hearing and resolution of any other issues.

1. Parties or interested persons with procedural requests different from or outside of the scope of this notice should contact the Case Manager at any time, who will try to accommodate the requests. Agreements between a party and the Prosecution Team will generally be accepted by the Hearing Panel as stipulations.
2. Objections to (a) any procedure to be used or not used during this hearing, (b) any documents or other evidence submitted by the Prosecution Team, or (c) any other matter set forth in this notice, must be submitted in writing no later than April 19, 2010 to the Legal Advisor to the Hearing Panel:

Michael Levy
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814
(916) 341-5193
mlevy@waterboards.ca.gov

Untimely objections will be deemed waived. Procedural objections about the matters contained in this notice will not be entertained at the hearing. Further, except as otherwise stipulated, any procedure not specified in this hearing notice will be deemed waived pursuant to section 648(d) of Title 23 of the California Code of Regulations, unless a timely objection is filed.

3. Any issues outside the scope of those described in section C.2, above, that cannot be resolved by stipulation shall be brought to the attention of the Legal Advisor to the Hearing Panel, as set forth in section C.2, by April 19, 2010 if possible, and if not possible, then at the earliest possible time with an explanation about why the issue could not have been raised sooner.

IX. APPLICABILITY OF NOTICE

The Executive Officer has directed the use of this standard notice in an order dated March 5, 2008. If you have any questions about this Notice of Public Hearing, please contact as appropriate, the Case Manager of the Prosecution Team, or the Legal Advisor to the Hearing Panel as described above.

Date: February 16, 2010

EXHIBIT 2

1 MICHAEL W. WEBB, SBN 133414
2 City Attorney for the
3 City of Redondo Beach
4 415 Diamond Street
5 Redondo Beach, CA
6 90277-0639

7
8 Phone: (310) 318-0655
9 Fax: (310) 372-0167

10 Attorney for Petitioner CITY
11 OF REDONDO BEACH

12 STATE OF CALIFORNIA
13 REGIONAL WATER RESOURCES CONTROL BOARD
14 LOS ANGELES REGION
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16 In the Matter of)
17)
18 ADMINISTRATIVE CIVIL LIABILITY)
19 COMPLAINT R4-2008-0058-M ISSUED)
20 TO THE CITY OF REDONDO BEACH BY)
21 CALIFORNIA REGIONAL WATER)
22 QUALITY BOARD, LOS ANGELES)
23 REGION, REGARDING SEASIDE)
24 LAGOON)

DECLARATION OF JUSTUS J. BRITT RE:
ATTEMPTS TO REVIEW DOCUMENTS IN
SUPPORT OF BRIEF IN OPPOSITION TO
ADMINISTRATIVE CIVIL LIABILITY
COMPLAINT NO. R4-2008-0058-M

25 **DECLARATION OF JUSTUS J. BRITT**

26 I, Justus J. Britt, declare as follows:

- 27 1. I am an attorney at law admitted to practice before all Courts of the State of
28 California. I have personal knowledge of each matter and the facts stated herein as a result of my
employment with Michel & Associates, P.C., special counsel for the City of Redondo Beach, and
if called upon and sworn as a witness, I could and would testify competently thereto.
2. On April 5, 2010, I had a conversation with my colleague, Andi Pacis, who stated
that she called the Los Angeles Regional Water Quality Control Board (RWQCB) on April 1,
2010, to try to arrange for a time to inspect documents. Ms. Pacis indicated she did not reach the
person who needed to be contacted, Laura Gallardo.
3. On April 5, 2010, I emailed Ms. Gallardo at lgallardo@waterboards.ca.gov to

1 make arrangements to review the file associated with Administrative Civil Liability Complaint
2 R4-2008-0058-M. A true and correct copy of the email is attached hereto as EXHIBIT A.

3 4. On April 5, 2010, I called the RWQCB at (213) 576-6600 and was connected to
4 Cindy Flores' voicemail. I left a message stating the reason for the call and requesting she call me
5 back.

6 5. On April 6, 2010, Mr. Flores called me back and left a message stating that a fax to
7 Ms. Gallardo was required to initiate the process of the RWQCB compiling the necessary
8 documents.

9 6. On April 6, 2010, I sent a fax to Ms. Gallardo at (213) 576-6676 requesting a
10 review of the complaint and all associated documents. A true and correct copy is attached hereto
11 as EXHIBIT B.

12 7. Attached as EXHIBIT C is a true and correct copy of an email from Scott M.
13 Franklin dated April 6, 2010. The email states, among other things, that "[w]e have a very limited
14 time frame in which this review will be relevant and helpful, and it appears a fourth of that time
15 has already passed and we do not even have an appointment set yet."

16 8. On April 7, 2010, I called Ms. Gallardo at (213) 576-6636, but I was only able to
17 reach her voicemail.

18 9. On April 8, 2010, I again called Ms. Gallardo, but I was only able to reach her
19 voicemail.

20 10. On April 9, 2010, I sent an email to Ms. Gallardo. A true and correct copy is
21 attached hereto as EXHIBIT D. That email outlined our attempts to schedule a time to review the
22 documents at the RWQCB made to date and indicated that we were still interested in doing a
23 review.

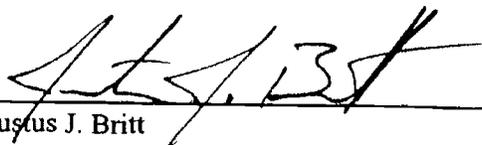
24 11. On April 12, 2010, Ms. Gallardo called me and stated that the RWQCB had not yet
25 compiled the necessary documents and that she would call me back when they had done so.

26 12. On April 15, 2010, at 1:54 p.m., Ms. Gallardo called me, stating that the necessary
27 documents had been compiled and asked when we would like to review them. Ms. Gallardo
28 further stated that she would be leaving the office at 3:45 p.m. (indicating review could not occur

1 after 3:45 p.m.) and that the RWQCB was closed on Friday, April 16, 2010, due to state
2 furloughs. I told Ms. Gallardo that I would have to check my schedule and call her back with a
3 time that I could inspect the documents.

4 13. On April 15, 2010, I called Ms. Gallardo to schedule an inspection of the
5 documents on April 19, 2010, starting at 9:00 a.m.

6 I declare under penalty of perjury under the laws of the State of California that the
7 foregoing is true and correct and that it was executed on April 16, 2010, at Long Beach,
8 California.

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Justus J. Britt

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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Christina Sanchez, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On April 19, 2010, I served the foregoing document(s) described as

OBJECTIONS RELATED TO PUBLIC HEARING RE: ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R4-2008-0058-M

on the interested parties in this action by placing
[] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Jennifer Fordyce
State Water Resources Control Board
1001 "I" Street, 22nd Floor
Sacramento, CA 95814
jfordyce@waterboards.ca.gov

X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

Executed on April 19, 2010, at Long Beach, California.

X (VIA ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission. Said transmission was reported and completed without error.

Executed on April 19, 2010, at Long Beach, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


CHRISTINA SANCHEZ

EXHIBIT “20”

1 MAYUMI E. OKAMOTO, Staff Counsel (SBN 253243)
Office of Enforcement
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5

6 Attorney for the Prosecution Team

7 BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
8

9 LOS ANGELES REGION

10 In the Matter of:)

11 **Administrative Civil Liability Complaint**)
No. R4-2008-0058-M)
12 **City of Redondo Beach,**)
Seaside Lagoon)
13 _____)

Prosecution Team Objections to the
City of Redondo Beach's April 19, 2010
Submission and Request for Pre-
Hearing Conference

14 The Prosecution Team files the following objections to the City of Redondo
15 Beach's (City) April 19, 2010 "Submission of Documents by the City of Redondo Beach"
16 (Submission of Documents) and "Brief in Opposition to Administrative Civil Liability
17 Complaint No. R4-2008-0058-M" (Opposition Brief) in relation to the panel hearing before
18 members of the Los Angeles Regional Water Quality Control Board (Regional Board).
19 Section C.2 of the Notice of Public Hearing states, "[o]bjections to (a) any procedure to be
20 used or not used during this hearing, (b) any documents or other evidence submitted by
21 the Prosecution Team, or (c) any other matter set forth in this notice must be submitted in
22 writing no later than April 19, 2010 to the Legal Advisor to the Hearing Panel." Section
23 C.3 of the Notice of Public Hearing addresses issues outside of the scope of section C.2,
24 which would include objections to any document or other evidence submitted by the City.

25 The City had its first opportunity to submit its evidence for the hearing panel's
26 consideration for this adjudicative proceeding on Monday April 19, 2010 as provided for in
27 Section VI of the Notice of Public Hearing. As the deadline for the City's submission of
28 additional documents or evidence was on April 19, 2010, this is the earliest possible time

1 pursuant to Section C.3 for the Prosecution Team to object to documents or evidence
2 submitted by the City. The Prosecution Team raises these objections in an attempt to
3 narrow the scope of issues relating to this proceeding for a more efficient hearing before
4 the panel of the Regional Board.

5 **I. The Equitable Defense of Laches is Inapplicable in this Administrative**
6 **Proceeding for Mandatory Minimum Penalties Because the Imposition of**
7 **Penalties is Mandated by Statute.**

8 The Prosecution Team objects to the City's assertion of the equitable defense of
9 laches as not proper in this administrative proceeding. The City argues that the doctrine
10 of laches precludes the City's liability for violations occurring more than three years prior
11 to the time formal enforcement is taken. (Prosecution Team Exhibit 12, pg. 6). The
12 Prosecution Team disagrees with the City's assertion. The equitable defense of laches
13 cannot be used to avoid the imposition of statutorily mandated penalties. Laches is
14 characterized as an equitable defense. (see *Farahani v. San Diego Community College*
15 *Dist.* (2009) Cal.App.4th 1486, 1494.) It is an established legal maxim that equity does not
16 possess the power to disregard or set aside the express terms of legislation. (see 30 Cal.
17 Jur. 3d Equity § 16.) Moreover, principles of equity cannot be used to avoid a statutory
18 mandate, such as those seen in the mandatory penalty scheme established by Water
19 Code section 13385. (*Ghory v. Al-Lahhan* (1989) 209 Cal.App.3d 1487, 1492; *Jiagbogu*
20 *v. Mercedes Benz* (2004) 118 Cal.App.4th 1235, 1244.)

21 In *Ghory*, a gas station attendant sought overtime compensation from his former
22 employer with whom he had a contract with for a set salary based on a certain number of
23 hours worked. (*Id.* at 1489.) In the employee's attempt to recoup overtime payments and
24 penalty wages, his employer pointed to the contract and raised the equitable defense of
25 unjust enrichment to preclude the employee's ability to recover overtime compensation.
26 (*Id.* at 1492.) The Court found that the equitable principle of unjust enrichment could not
27 defeat what was mandated by California Labor Code section 1194. That section provides
28 "[n]otwithstanding any agreement to work for a lesser wage, any employee receiving less

1 than the legal minimum wage or the legal overtime compensation applicable to the
2 employee is entitled to recover in a civil action the unpaid balance of the full amount of
3 this minimum wage or overtime compensation, including interest thereon, reasonable
4 attorney's fees, and costs of suit." (Lab. Code § 1194.) Since this provision mandates
5 that an employee receive the legal overtime compensation, the Court concluded that
6 "principles of equity cannot be used to avoid a statutory mandate." (*Ghory*, at 1492.)

7 A similar issue was discussed in *Lass v. Eliassen*, where the plaintiff purchaser of
8 real property sought to collect rent and profits on the real property from the executor of an
9 estate during the interim period from the date of the sale of the property until the probate
10 court confirmed the sale sixteen months later. (94 Cal.App. 175, 177.) The plaintiff
11 argued that: 1) the doctrine of relation should apply so the probate court's confirmation
12 could relate back to the date of sale entitling the plaintiff to immediate rents, and 2) he
13 was the equitable owner of the property from the date of the sale entitling him to collect
14 rent monies. (*Id.*) Under former section 1517 of the California Code of Civil Procedure,
15 the representative of an estate has no authority to transfer property of a decedent without
16 the authority of the probate court. (*Id.* at 178.) Without such confirmation, sales of the
17 decedent's property are ineffectual and no title passes. (*Id.*) The Court stated "[s]ection
18 1517 of the Code of Civil Procedure in express terms declares that no title passes until
19 confirmation. The case is not one, therefore, for the application of equitable doctrines but
20 rather one for the construction of an act of the legislature." (*Id.* at 179.) The Court held
21 that "[r]ules of equity cannot be intruded in matters that are plain and fully covered by
22 positive statute" and denied both of plaintiff's equitable arguments. (*Id.*)

23 In the present case, the City is raising the equitable principle of laches to attempt
24 to preclude the Regional Board from assessing mandatory minimum penalties under
25 Water Code section 13385 subdivisions (h) and (i). The cardinal rule of statutory
26 construction is to pursue the intent of the Legislature and effectuate the purpose of the
27 law. (*S.D. Myers, Inc. v. City and County of San Francisco* (2003) 336 F.3d 1174, 1179.)
28 The California Supreme Court has held that when the court interprets any statute, it is

1 well settled that it begins with the statute's words "because they generally provide the
2 most reliable indicator of legislative intent." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) If
3 the language is clear and unambiguous, there is ordinarily no need for judicial
4 construction. (See *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094,
5 1103.) In construing a provision, "we presume the Legislature meant what it said" and the
6 plain meaning governs. (*People v. Snook* (1997) 16 Cal.4th 1210, 1215.)

7 The plain language of section 13385 subdivision (h) is clear. A mandatory
8 minimum penalty of three-thousand dollars "shall be assessed for each serious violation."
9 (emphasis added.) Additionally, the language of section 13385 subdivision (i) is similarly
10 clear stating that a mandatory minimum penalty of three-thousand dollars "shall be
11 assessed for each violation whenever the person does any of the following four or more
12 times in any period of six consecutive months..." (emphasis added.) The use of the
13 mandatory language "shall" indicates a legislative intent to impose a mandatory duty; no
14 discretion is given to the Regional Board in assessing these mandatory minimum
15 penalties. (SWRCB Order WQ 2007-0010, *In the Matter of the Petition of Escondido*
16 *Creek Conservancy and San Diego Coastkeeper*, pg. 4 ("The plain language of the
17 statute removes discretion from the water boards regarding the minimum amount that
18 they must assess when a serious violation has occurred"); *In re Luis B.* (2006) 142
19 Cal.App.4th 1117, 1123.) Further, had the Legislature intended laches to be a recognized
20 affirmative defense, it would have included it as a recognized affirmative defense in
21 Water Code section 13385, subdivision (j). Accordingly, because Water Code section
22 13385 subdivisions (h) and (i) are viewed as statutorily mandated, the equitable defense
23 of laches cannot be used to avoid the imposition of mandatory minimum penalties.
24 Therefore, the Prosecution Team requests that all arguments or evidence regarding the
25 equitable defense of laches be struck as inapplicable to this enforcement proceeding for
26 statutorily mandated penalties.

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1 **II. Arguments and Evidence Attacking the Effluent Limitation for Total**
2 **Suspended Solids in the Underlying 2005 NPDES Permit are Collateral**
3 **Attacks and should not be Allowed in this Enforcement Proceeding.**

4 The Prosecution Team objects to the City's presentation of evidence or arguments
5 relating to the validity of the daily maximum effluent limitation for total suspended solids
6 (TSS) under Order No. R4-2005-0016 (2005 NPDES Permit). The City argues that the
7 daily maximum effluent limitation for TSS in the 2005 NPDES Permit should have been
8 established at 150 mg/L, and not 75 mg/L as adopted in the 2005 NPDES Permit.
9 Moreover, the City argues that the Regional Board can only enforce the 150 mg/L daily
10 maximum effluent limitation as "there is just no evidence supporting the Regional Board's
11 decision to impose the 75 mg/L daily effluent limitation for TSS." (City's Brief in
12 Opposition to Administrative Civil Liability Complaint, pg. 25-26.)

13 The Regional Board adopted the City's current NPDES Permit on March 3, 2005.
14 Water Code section 13320 provides a statutory mechanism for petitioning an action of the
15 Regional Board. Subsequent to the Regional Board's adoption of the City's 2005 NPDES
16 Permit, the City never filed a petition for review with the State Water Resources Control
17 Board challenging the daily maximum effluent limitation for TSS or any other provision of
18 the 2005 NPDES Permit. Accordingly, by its own inaction, the City accepted the TSS limit
19 in its permit. As such, all of the terms and provisions of the 2005 NPDES Permit,
20 including its effluent limitations, became final providing the foundation for the Prosecution
21 Team's allegations in the Complaint. Any argument or evidence in the present
22 enforcement proceeding on the validity of the underlying 2005 NPDES Permit should be
23 considered a collateral attack on the permit and should not be allowed during this
24 proceeding. The Prosecution Team urges the Hearing Panel to strike as improper all
25 arguments or evidence regarding the validity of the effluent limitation for TSS in the 2005
26 NPDES Permit.

27 **III. Request for Prehearing Conference**

28 The Prosecution Team requests a prehearing conference under Water Code

1 section 13228.15 and Government Code section 11511.5 to address all of the Parties'
2 objections to evidence and a clarification of issues to be presented during the May 17,
3 2010 Hearing Panel. In addition to a discussion of the objections to evidence raised by
4 the Parties, the Prosecution Team proposes that the prehearing conference also include
5 a discussion regarding the April 27, 2010 letter from the Prosecution Team in response to
6 City's argument in section III.C. of its Opposition Brief to facilitate a possible stipulation
7 regarding alleged violations within the purview of section III.C.

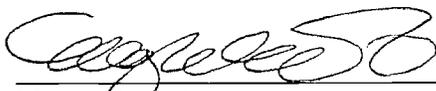
8 **IV. Requested Action**

9 The Prosecution Team respectfully requests that the Hearing Panel sustain its
10 objections and order the following:

- 11 A) All arguments or evidence regarding the equitable defense of laches be struck as
12 inapplicable to this enforcement proceeding for statutorily mandated penalties;
13 B) All arguments or evidence regarding the validity of the effluent limitation for total
14 suspended solids in Order No. R4-2005-0016 be struck as an improper collateral
15 attack on the underlying 2005 NPDES Permit.

16 Furthermore, the Prosecution Team requests that a prehearing conference be convened
17 as soon as possible to address the objections raised by the Parties and to narrow the
18 issues for consideration by the Hearing Panel on May 17, 2010.

19
20 Respectfully submitted,

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22 _____
23 Mayumi E. Okamoto
24 Attorney for the Prosecution Team

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28 Date: 4/27/10

EXHIBIT “21”

1 MAYUMI E. OKAMOTO, Staff Counsel (SBN 253243)
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6 Attorney for the Prosecution Team

7 BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

8
9 LOS ANGELES REGION

10 In the Matter of:)
11 **Administrative Civil Liability Complaint**) **Prosecution Team Response to**
No. R4-2008-0058-M) **Objections of the City of Redondo**
12 **City of Redondo Beach,**) **Beach**
Seaside Lagoon)
13 _____)

14 The Prosecution Team files the following response to objections raised by the City
15 of Redondo Beach (City) related to the panel hearing before members of the Los Angeles
16 Regional Water Quality Control Board (Regional Board) on Administrative Civil Liability
17 Complaint No. R4-2008-0058-M (Complaint).

18 The City contends it has not been afforded its right to due process in this
19 proceeding because the Regional Board effectively prevented the City from reviewing
20 information contained in the file for this Complaint. As the City notes in its objection, the
21 Notice of Public Hearing states that the "ACLC, related documents, proposed order,
22 comments received, and other information about the subject of the ACLC are available for
23 inspection between the hours of 8:00 a.m. and 5:00 p.m." at the Regional Board office.
24 (Notice of Public Hearing, Section II, pg. 2.) The Notice of Public Hearing also provides
25 the general telephone number of the Regional Board office to make arrangements for a
26 file review. The City states that it "called, emailed, and faxed the Regional Board on a
27 relatively consistent basis from April 1 through April 15, 2010 trying to set up a review of
28 the Prosecution Team file." The declaration of Justus J. Britt describes the timeline of

1 events and actions undertaken between the period of April 1 through April 15, 2010 to set
2 up such a review.

3 While the Notice of Public Hearing lists a general telephone number to arrange for
4 a file review, it also includes the specific contact information for Prosecution Team case
5 manager, Mr. Russ Colby. At no time during this period did the City attempt to contact
6 the case manager to assist in arranging a time to conduct a Prosecution Team file review.
7 If the City felt that its requests were not being responded to adequately, it also had the
8 ability to directly contact Mr. Colby to seek assistance in arranging a time for a review of
9 the Prosecution Team file. The City made no such attempts. The City never notified the
10 Prosecution Team of its request to review the Prosecution Team's file but rather chose to
11 continue to pursue a course of action which by its own argument was untimely and
12 nonresponsive. The Prosecution Team understands and agrees that the City, and any
13 party appearing before the Regional Board, has a right to procedural due process. At the
14 same time, requesting withdrawal of the Complaint when more direct avenues were
15 available to the City to assist in arranging a time for the file review is an extreme remedy.

16 Additionally, the City requests the Prosecution Team be barred from using as
17 evidence any documents in the file if this matter is not withdrawn. The Prosecution Team
18 seeks clarification on this request. It is unclear whether the City means to bar the
19 Prosecution Team's evidence submitted on March 29, 2010 in its preliminary hearing
20 panel binder to the extent that those documents were also included in the file for this
21 matter. Moreover, the Prosecution Team would oppose any request that sought to limit
22 its ability to present additional evidence in rebuttal of matters submitted by the City on
23 April 19, 2010.

24 The Prosecution Team respectfully opposes the City's due process objection
25 based on the foregoing reasons and would request that the Regional Board deny the
26 City's request to withdraw the Complaint. The Prosecution Team also seeks clarification
27 on the City's alternate request in the event that the Regional Board decides not to
28 withdraw the Complaint. Furthermore, though the Notice of Hearing Panel states, "the

1 Hearing Panel does not generally require the cross examination of witnesses," the
2 Prosecution Team understands that this does not limit either Parties' rights under the
3 California Government Code section 11513 subdivision (b) or Title 23, California Code of
4 Regulations section 648.5 to cross-examine opposing witnesses.

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6 Respectfully submitted,

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9 Mayumi E. Okamoto
Attorney for the Prosecution Team

Date: 4/27/10

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EXHIBIT “22”



California Regional Water Quality Control Board

Los Angeles Region



Linda S. Adams
Agency Secretary

Recipient of the 2001 *Environmental Leadership Award* from Keep California Beautiful

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640 - Internet Address: <http://www.waterboards.ca.gov/losangeles>

Arnold Schwarzenegger
Governor

April 27, 2010

[via email]

Mr. Scott Franklin
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Mr. Michael Webb
City of Redondo Beach
415 Diamond Street
Redondo Beach, CA 90277
Michael.webb@redondo.org

Dear Messrs. Franklin and Webb:

SUBJECT: Prosecution Team Response to the City of Redondo Beach's April 19, 2010 Brief in Opposition to Administrative Civil Liability

The Prosecution Team is in receipt of the City of Redondo Beach's (City) April 19, 2010 Brief in Opposition to Administrative Civil Liability (Opposition Brief). In the Opposition Brief, the City argues in section III.C. that some of the violations identified in Exhibit A of Administrative Civil Liability Complaint No. R4-2008-0058-M are "based on sampling protocol that the Regional Board now recognizes does not provide accurate data." (Opposition Brief, pg. 23.) Specifically, the City refers to language of Tentative Order No. R4-2010-XXXX (Tentative Order) to show that the manner in which sample collection at the sample collection location under the previous permit, Order No. R4-2005-0016, may not have provided accurate sampling results. The Tentative Order states, "sample collection is tidally influenced. During high tide conditions, the sampling vault would be almost completely inundated with sea water and the effluent pipe would be completely submerged. Therefore, the grab samples collected during high tide may not be representative of the effluent. Sampling should be conducted when there is a discharge and during low tide conditions based on data provided by the National Oceanic and Atmospheric Administration's (NOAA), Station No. 9410840 (Santa Monica, CA)." (City Exhibit 17, pg. 7.)

The Prosecution Team has considered the arguments raised by the City in section III.C. of its Opposition Brief and reviewed the City's "Sampling Time Summary." (City Exhibit 18.) As you recall, the Prosecution Team's Exhibit A originally identified fifty-five (55) effluent limit violations, fifty (50) of which were subject to mandatory minimum penalties for a total of \$150,000. Based on the arguments raised in section III.C. of its Opposition Brief and the City's Sampling Time Summary, the Prosecution Team has concluded that the number of effluent limit violations should be modified to twenty-four (24) effluent limit violations, twenty-two (22) of which are subject to mandatory minimum penalties in the amount of \$66,000. Attached you will find the Prosecution Team's original Exhibit A. The original Exhibit A highlights the effluent limit violations which are rescinded as "no effluent limit violation" for the purposes of Water Code section 13385 subdivisions (h) and (i). Additionally, you will find attached

California Environmental Protection Agency



Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.

Mr. Scott Franklin
Mr. Michael Webb

- 2 -

April 27, 2010

Amended Exhibit A showing the remaining twenty-four (24) effluent limit violations still at issue in Administrative Civil Liability Complaint No. R4-2008-0058-M, twenty-two (22) of which remain subject to the imposition of mandatory minimum penalties.

It should be noted that under Order No. R4-2005-0016 and its corresponding Monitoring and Reporting Program No. 8034, the City is responsible for establishing a sampling station at the point of discharge where representative samples of effluent can be obtained. (MRP No. 8034, Prosecution Team Exhibit 8, pg. T-2.) The Regional Board did not dictate the location nor did it select the sampling vault as the sample collection location. Though considered "no effluent limit violation," for purposes of assessing mandatory minimum penalties under Water Code section 13385 subdivisions (h) and (i), be advised that failure to comply with the terms of Monitoring and Reporting Program No. 8034 in accordance with your waste discharge requirements is a violation of Order No. R4-2005-0016 and the California Water Code. The City is ultimately responsible for compliance with its permit and therefore, the City may still be subject to further enforcement action for discretionary penalties for failing to comply with Order No. R4-2005-0016, including Monitoring and Reporting Program No. 8034.

Sincerely,


Samuel Unger, P. E.
Assistant Executive Officer

Enclosures (2)

cc: [via email only]
Ms. Mayumi Okamoto, Office of Enforcement, State Water Resources Control Board
Mr. Russ Colby, Los Angeles Regional Water Quality Control Board
Ms. Tracy Egoscue, Los Angeles Regional Water Quality Control Board
Ms. Frances McChesney, Office of Chief Counsel, State Water Resources Control Board

California Environmental Protection Agency



Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.

AMENDED EXHIBIT "A"
 City of Redondo Beach
 Seaside Lagoon
 CI 8034

Date	Monitoring Period	Violation Type	Parameter	Reported Value	Permit Limit	Units	Pollutant Category	% Exceeded	Serious/Chronic	Water Code Section 13385	Penalty
05/23/2003	May-03	Daily Maximum	TRC	1,800	8	µg/L	2	22,400	Serious	(b)(1)	\$3,000
05/23/2003	May-03	Monthly Average	TSS	76	50	mg/L	1	52	Serious	(b)(1)	\$3,000
05/28/2003	May-03	Daily Maximum	TRC	840	8	µg/L	2	10,400	Serious	(b)(1)	\$3,000
05/31/2003	May-03	Monthly Average*	TRC	1,320	2	µg/L	2	65,900	Serious	(b)(1)	\$3,000
06/24/2003	Jun-03	Monthly Average	TSS	64	50	mg/L	1	28	Chronic	(b)(1)	\$3,000
07/10/2003	Jul-03	Monthly Average	TSS	76	50	mg/L	1	52	Serious	(b)(1)	\$3,000
07/22/2003	Jul-03	30-Day Geometric Mean*	Enterococcus	99	24	MPN/100 ml	NA	NA	Chronic	(b)(1)	\$3,000
08/20/2003	Aug-03	Monthly Average	TSS	84	50	mg/L	1	68	Serious	(b)(1)	\$3,000
08/15/2005	Aug-05	Daily Maximum	BOD ₅	75	30	mg/L	1	150	Serious	(b)(1)	\$3,000
08/15/2005	Aug-05	Monthly Average	BOD ₅	75	20	mg/L	1	275	Serious	(b)(1)	\$3,000
09/26/2005	Sep-05	Daily Maximum	TSS	80	75	mg/L	1	7	Chronic	(b)(1)	\$0
10/24/2005	Oct-05	30-Day Rolling Average*	Total Coliform	2,014	1,000	MPN/100 ml	NA	NA	Chronic	(b)(1)	\$3,000
06/05/2006	Jun-06	Daily Maximum	TSS	112	75	mg/L	1	49	Serious	(b)(1)	\$3,000
06/05/2006	Jun-06	Monthly Average	TSS	112	50	mg/L	1	124	Serious	(b)(1)	\$3,000
07/24/2006	Jul-06	Daily Maximum	TSS	81	75	mg/L	1	8	Chronic	(b)(1)	\$0
07/31/2006	Jul-06	Monthly Average*	TSS	89	50	mg/L	1	77	Serious	(b)(1)	\$3,000
10/2/2006	Oct-06	Daily Maximum	TSS	86	75	mg/L	1	15	Chronic	(b)(1)	\$3,000
10/2/2006	Oct-06	Monthly Average	TSS	86	50	mg/L	1	72	Serious	(b)(1)	\$3,000
10/2/2006	Oct-06	Daily Maximum	BOD ₅	92.4	30	mg/L	1	208	Serious	(b)(1)	\$3,000
10/2/2006	Oct-06	Monthly Average	BOD ₅	92.4	20	mg/L	1	362	Serious	(b)(1)	\$3,000
9/24/2007	Sep-07	Daily Maximum	TRC	710	8	µg/L	2	8,775	Serious	(b)(1)	\$3,000
10/6/2007	Oct-07	Daily Maximum	TRC	2,100	8	µg/L	2	26,150	Serious	(b)(1)	\$3,000
10/6/2007	Oct-07	Monthly Average	TRC	2,100	2	µg/L	2	104,900	Serious	(b)(1)	\$3,000
7/28/2008	Jul-08	Daily Maximum	TRC	2,000	8	µg/L	2	24,900	Serious	(b)(1)	\$3,000
										Total	\$66,000

EXHIBIT "A"
City of Redondo Beach
Seaside Lagoon
CI 8034

June 2002 - July 2008

Date	Monitoring Period	Violation Type	Parameter	Reported Value	Permit Limit	Units	Pollutant Category	% Exceeded	Serious/Chronic	Water Code Section 13385	Penalty
06/20/2002	Jun-02	30-Day Geometric Mean*	Bacterococcus	156	24	MPN/100 ml	NA	NA	Chronic	(b)(1)	\$0
05/23/2003	May-03	Daily Maximum	TRC	1,800	8	µg/L	2	22,400	Serious	(b)(1)	\$3,000
05/23/2003	May-03	Monthly Average	TSS	76	50	mg/L	1	52	Serious	(b)(1)	\$3,000
05/28/2003	May-03	Daily Maximum	TRC	840	8	µg/L	2	10,400	Serious	(b)(1)	\$3,000
05/31/2003	May-03	Monthly Average	TRC	840	2	µg/L	2	41,900	Serious	(b)(1)	\$3,000
06/03/2003	Jun-03	Daily Maximum	TRC	140	8	µg/L	2	1,650	Serious	(b)(1)	\$3,000
06/24/2003	Jun-03	Monthly Average	TSS	64	50	mg/L	1	28	Chronic	(b)(1)	\$3,000
06/30/2003	Jun-03	30-Day Geometric Mean*	Bacterococcus	38	24	MPN/100 ml	NA	NA	Chronic	(b)(1)	\$3,000
07/10/2003	Jul-03	Monthly Average	TSS	76	50	mg/L	1	52	Serious	(b)(1)	\$3,000
07/29/2003	Jul-03	30-Day Geometric Mean*	Bacterococcus	35	24	MPN/100 ml	NA	NA	Chronic	(b)(1)	\$3,000
08/20/2003	Aug-03	Monthly Average	TSS	84	50	mg/L	1	68	Serious	(b)(1)	\$3,000
08/27/2003	Aug-03	30-Day Geometric Mean*	Bacterococcus	26	24	MPN/100 ml	NA	NA	Chronic	(b)(1)	\$3,000
08/17/2004	Aug-04	Daily Maximum	TSS	188	150	mg/L	1	25	Chronic	(b)(1)	\$0
08/17/2004	Aug-04	Monthly Average	TSS	188	50	mg/L	1	276	Serious	(b)(1)	\$3,000
08/17/2004	Aug-04	Monthly Average	BOD ₅	236	20	mg/L	1	18	Chronic	(b)(1)	\$0
09/01/2004	Sep-04	Daily Maximum	BOD ₅	525	30	mg/L	1	1,650	Serious	(b)(1)	\$3,000
09/01/2004	Sep-04	Monthly Average	BOD ₅	525	20	mg/L	1	2,525	Serious	(b)(1)	\$3,000
08/15/2005	Aug-05	Daily Maximum	BOD ₅	75	30	mg/L	1	150	Serious	(b)(1)	\$3,000
08/15/2005	Aug-05	Monthly Average	BOD ₅	75	20	mg/L	1	275	Serious	(b)(1)	\$3,000
09/26/2005	Sep-05	Daily Maximum	TSS	80	75	mg/L	1	7	Chronic	(b)(1)	\$0
10/03/2005	Oct-05	Daily Maximum	BOD ₅	405	30	mg/L	1	3	Chronic	(b)(1)	\$3,000
10/03/2005	Oct-05	Instantaneous	pH	5.95	6.5 - 8.5	pH units	NA	NA	Chronic	(b)(1)	\$3,000
10/03/2005	Oct-05	30-Day Rolling Average*	Total Coliform	1,646	1,000	MPN/100 ml	NA	NA	Chronic	(b)(1)	\$3,000
10/17/2005	Oct-05	30-Day Rolling Average*	Total Coliform	2,190	1,000	MPN/100 ml	NA	NA	Chronic	(b)(1)	\$3,000
10/17/2005	Oct-05	30-Day Rolling Average*	Total Coliform	2,005	1,000	MPN/100 ml	NA	NA	Chronic	(b)(1)	\$3,000
10/24/2005	Oct-05	30-Day Rolling Average*	Total Coliform	2,164	1,000	MPN/100 ml	NA	NA	Chronic	(b)(1)	\$3,000
10/31/2005	Oct-05	30-Day Rolling Average*	Total Coliform	1,430	1,000	MPN/100 ml	NA	NA	Chronic	(b)(1)	\$3,000

EXHIBIT "A"
City of Redondo Beach
Seaside Lagoon
CI 8034

Date	Monitoring Period	Violation Type	Parameter	Reported Value	Permit Limit	Units	Pollutant Category	% Exceeded	Serious/Chronic	Water Code Section 13385	Penalty
06/05/2006	Jun-06	Daily Maximum	TSS	112	75	mg/L	1	49	Serious	(b)(1)	\$3,000
06/05/2006	Jun-06	Monthly Average	TSS	112	50	mg/L	1	124	Serious	(b)(1)	\$3,000
07/18/2006	Jul-06	Daily Maximum	TSS	96	75	mg/L	1	28	Chronic	(b)(1)	\$3,000
07/24/2006	Jul-06	Daily Maximum	TSS	81	75	mg/L	1	8	Chronic	(b)(1)	\$3,000
07/31/2006	Jul-06	Monthly Average	TSS	79	50	mg/L	1	58	Serious	(b)(1)	\$3,000
08/07/2006	Aug-06	Daily Maximum	TSS	286	75	mg/L	1	281	Serious	(b)(1)	\$3,000
08/28/2006	Aug-06	Daily Maximum	TSS	81	75	mg/L	1	8	Chronic	(b)(1)	\$3,000
08/28/2006	Aug-06	Daily Maximum	HOD	76	30	mg/L	1	157	Serious	(b)(1)	\$3,000
08/28/2006	Aug-06	Monthly Average	HOD	76	20	mg/L	1	178	Serious	(b)(1)	\$3,000
08/28/2006	Aug-06	Monthly Average	TSS	184	50	mg/L	1	268	Serious	(b)(1)	\$3,000
09/1/2006	Sep-06	Monthly Average	TSS	76	75	mg/L	1	1	Chronic	(b)(1)	\$3,000
09/14/2006	Sep-06	Daily Maximum	HOD	49	30	mg/L	1	140	Serious	(b)(1)	\$3,000
09/14/2006	Sep-06	Daily Maximum	TSS	1000	8	mg/L	2	12400	Serious	(b)(1)	\$3,000
09/25/2006	Sep-06	Daily Maximum	TRC	76	75	mg/L	1	1	Chronic	(b)(1)	\$3,000
09/25/2006	Sep-06	Daily Maximum	TSS	72.1	30	mg/L	1	140	Serious	(b)(1)	\$3,000
09/25/2006	Sep-06	Daily Maximum	HOD	76	50	mg/L	1	52	Serious	(b)(1)	\$3,000
09/30/2006	Sep-06	Monthly Average	TSS	72	20	mg/L	1	250	Serious	(b)(1)	\$3,000
10/2/2006	Oct-06	Daily Maximum	TSS	86	75	mg/L	1	15	Chronic	(b)(1)	\$3,000
10/2/2006	Oct-06	Daily Maximum	BOD ₅	92.4	30	mg/L	1	208	Serious	(b)(1)	\$3,000
10/9/2006	Oct-06	Daily Maximum	ORP	118	15	mg/L	1	2020	Serious	(b)(1)	\$3,000
10/9/2006	Oct-06	Daily Maximum	TSS	146	75	mg/L	1	95	Serious	(b)(1)	\$3,000
10/9/2006	Oct-06	Daily Maximum	BOD ₅	97.7	30	mg/L	1	226	Serious	(b)(1)	\$3,000
10/31/2006	Oct-06	Monthly Average *	TSS	116	50	mg/L	1	132	Serious	(b)(1)	\$3,000
10/31/2006	Oct-06	Monthly Average *	BOD ₅	95.1	20	mg/L	1	376	Serious	(b)(1)	\$3,000
9/24/2007	Sep-07	Daily Maximum	TRC	710	8	µg/L	2	8,775	Serious	(b)(1)	\$3,000
10/6/2007	Oct-07	Daily Maximum	TRC	2,100	8	µg/L	2	26,150	Serious	(b)(1)	\$3,000
10/6/2007	Oct-07	Monthly Average	TRC	2,100	2	µg/L	2	104,900	Serious	(b)(1)	\$3,000
7/28/2008	Jul-08	Daily Maximum	TRC	2,000	8	µg/L	2	24,900	Serious	(b)(1)	\$3,000
										Total	\$150,000

EXHIBIT “23”

Scott Franklin

From: Frances McChesney [FMcChesney@waterboards.ca.gov]
Sent: Wednesday, April 28, 2010 11:19 AM
To: Scott Franklin; michael.webb@redondo.org; Mayumi Okamoto
Cc: Ted Cobb
Subject: Seaside Lagoon MMP matter (Complaint R4-2008-0058): Pre-hearing conference

Dear Ms. Okamoto, Mr. Webb, and Mr. Franklin,

Ms. Okamoto requested a pre-hearing conference to narrow the issues for the hearing in the Seaside Lagoon ACL matter. I have been able to confirm May 3 at 9:30 am for a pre-hearing conference with Ms. Madelyn Glickfeld, who will be the chair of the hearing panel for this matter. I will send a tentative ruling on the objections before that date and a call in number for the conference. Please confirm right away if that time and date work for you. If not, I will confirm another time with Ms. Glickfeld.

Note that I will be traveling extensively beginning May 5 through May 14 and will not be back in the office before the hearing, but will attempt to address the objections and other matters by May 5th. Ted Cobb, Assistant Chief Counsel, will handle this matter between May 5 and May 14 as needed. His contact information is tcobb@waterboards.ca.gov, (916)341-5171.

I see that on April 27, 2010, the Prosecution Team responded to the City's "Opposition Brief" dated April 19, 2010, which includes a revised Exhibit A to the Complaint. I request that the Prosecution team prepare a revised draft Hearing Panel Report and Proposed Order and a revised draft Order reflecting the April 27 response. I also request that you provide those documents to me in Word by COB May 4, 2010, so that the Advisory Team can revise as appropriate at the hearing.

I have not heard from the City as to the amount of time you request. If you have made a request as to time before I was assigned to this matter, please let me know which document contains the request.

Thank you for your prompt attention to this matter.

Frances L. McChesney, Senior Staff Counsel Office of the Chief Counsel State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814-2828
Phone: (916)341-5174
Facsimile: (916)341-5199
Email Address: fmcchesney@waterboards.ca.gov

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EXHIBIT “24”

Scott Franklin

From: Scott Franklin
Sent: Thursday, April 29, 2010 5:51 PM
To: 'FMcChesney@waterboards.ca.gov'; 'MOkamoto@waterboards.ca.gov'
Cc: 'Michael.Webb@redondo.org'; W. Lee Smith
Subject: RE: R4-2008-0058-M: Order on Objections from City of Redondo Beach

Dear Ms. McChesney:

The City is not opposed to participating in a pre-hearing conference, but schedules cannot be reorganized in less than a week to allow for attendance at a conference to be held on May 3, 2010. Thus, the City proposes that the pre-hearing conference be held May 10, 2010, at 9:30 a.m.

Thank you,

Scott Franklin
Attorney

Direct: (562) 216-4474
Main: (562) 216-4444
Fax: (562) 216-4445
Email: SFranklin@michellawyers.com
Web: <http://www.michellawyers.com>

180 E. Ocean Blvd.
Suite 200
Long Beach, CA 90802

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-----Original Message-----

From: Mayumi Okamoto [mailto:MOkamoto@waterboards.ca.gov]
Sent: Thursday, April 29, 2010 3:53 PM
To: Scott Franklin; michael.webb@redondo.org; Frances McChesney
Cc: Ted Cobb; Tracy Egoscue
Subject: Re: R4-2008-0058-M: Order on Objections from City of Redondo Beach

Dear Ms. McChesney:

The Prosecution Team requests that the parties, the Legal Advisor to the Hearing Panel, and the Presiding Officer of the Hearing Panel convene a pre-hearing conference on Monday, May 3, 2010 at 9:30 am as previously noted in your cover letter to the Order on Objections to the City of Redondo Beach and recent emails. Specifically, the Prosecution Team requests this pre-hearing conference to discuss and clarify the portion of the Order which reads, "[t]he issue of laches will be considered by the Hearing Panel at the hearing." The Prosecution Team believes that a legal threshold determination on the applicability or non-applicability of the equitable defense of laches in the context of statutorily mandated penalties is required prior to the May 17, 2010 hearing. Without such a determination, it is difficult for the parties to understand what is expected of them in terms of preparing for the hearing. While the cover letter states that the parties will be allotted one hour each at the hearing

with the possibility of additional time as needed, it is difficult to gauge whether the parties will require significantly more than one hour without a pre-hearing ruling on this legal issue. Furthermore, the Prosecution Team will be preparing its Final Hearing Panel binder for submission to the City, the Advisory Team, and the Hearing Panel on May 6, 2010. A threshold determination on the applicability or non-applicability of the laches matter will dictate what is included as part of that Final Hearing Panel binder.

If it is the Presiding Officer's position that no legal threshold determination on the issue of laches should be made prior to the hearing, the Prosecution Team proposes that the pre-hearing conference cover issues, including but not limited to, how the oral arguments, and possible evidence, on this matter should be presented to the Hearing Panel in the most efficient manner. Because the parties will likely be making legal arguments, it is unclear whether the parties should focus on the laches issue as the first issue to be presented at the start of the hearing and whether the parties should expect a ruling from the Hearing Panel on this issue prior to their respective case-in-chief presentations. Accordingly, the Prosecution Team believes that clarification on the order of the proceedings would be beneficial to the parties, particularly if it is determined that no pre-hearing ruling on the issue of laches is to occur prior to May 17, 2010.

Thank you for your consideration and for the Presiding Officer's expeditious ruling on these important matters.

Sincerely,

Mayumi E. Okamoto

~~~~~  
Mayumi E. Okamoto  
Staff Counsel, Office of Enforcement  
State Water Resources Control Board  
1001 I Street, 16th Floor  
Sacramento, CA 95814  
(916) 341-5674 office  
(916) 208-4817 mobile  
(916) 341-5896 fax  
MOkamoto@waterboards.ca.gov  
~~~~~

***Beginning July 2009, mandatory furloughs will be taken on the first, second, and third Fridays of the month until June 2010.

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>>> Frances McChesney 4/29/2010 12:30 PM >>>
Dear Mr. Webb, Mr. Franklin, and Ms. Okamoto,

On April 19, 2010, the City of Redondo Beach submitted a brief and objections in this matter. On April 27, the Prosecution Team submitted responses. The hearing will be held on May 17 before a Los Angeles Water Board panel. The Chair of the Hearing Panel has made rulings on the objections and responses in this matter. Please see attached. Note that these are unsigned at this time, but the signed versions will be provided as soon as available.

As noted in the cover letter and recent emails, I have reserved 9:30 am on May 3 for a pre-hearing conference. Please let me know by Friday noon if you wish to have a pre-hearing conference and identify the issues for the conference.

Frances McChesney

Frances L. McChesney, Senior Staff Counsel Office of the Chief Counsel State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814-2828
Phone: (916)341-5174
Facsimile: (916)341-5199
Email Address: fmcchesney@waterboards.ca.gov

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EXHIBIT “25”

Scott Franklin

From: Frances McChesney [FMcChesney@waterboards.ca.gov]
Sent: Thursday, April 29, 2010 12:30 PM
To: Scott Franklin; michael.webb@redondo.org; Mayumi Okamoto
Cc: Frances McChesney; Ted Cobb; Tracy Egoscue
Subject: R4-2008-0058-M: Order on Objections from City of Redondo Beach
Attachments: ADMIN Civil Liability Complaint 04-29-10.pdf

Dear Mr. Webb, Mr. Franklin, and Ms. Okamoto,

On April 19, 2010, the City of Redondo Beach submitted a brief and objections in this matter. On April 27, the Prosecution Team submitted responses. The hearing will be held on May 17 before a Los Angeles Water Board panel. The Chair of the Hearing Panel has made rulings on the objections and responses in this matter. Please see attached. Note that these are unsigned at this time, but the signed versions will be provided as soon as available.

As noted in the cover letter and recent emails, I have reserved 9:30 am on May 3 for a pre-hearing conference. Please let me know by Friday noon if you wish to have a pre-hearing conference and identify the issues for the conference.

Frances McChesney

Frances L. McChesney, Senior Staff Counsel Office of the Chief Counsel State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814-2828
Phone: (916)341-5174
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EXHIBIT “26”

TENTATIVE ORDER- May 11, 2010
STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

In the matter of:)
)
Administrative Civil Liability Complaint)
No. R4-2008-0058-M)
City of Redondo Beach)
Seaside Lagoon)
_____)

ORDER ON LACHES DEFENSE RAISED BY THE CITY OF REDONDO BEACH

On April 19, 2010, Mr. Michael W. Webb, attorney for the City of Redondo Beach (City), submitted a Brief in Opposition to Administrative Civil Liability Complaint No. R4-2008-0058-M. On April 27, 2010, Ms. Mayumi E. Okamoto, attorney for the Prosecution Team of the Regional Water Quality Control Board, Los Angeles Region (Water Board), submitted the Prosecution Team Response to the City of Redondo Beach's April 19, 2010 Brief. On April 29, 2010, Ms. Okamoto reiterated her request for a pre-hearing conference to address the issue of laches. On May 6, 2010, both parties supplemented their submittals with respect to the issues of laches.

On May 11, 2010, Madelyn Glickfeld, Vice Chair for the Los Angeles Water Board and Presiding Officer of the Hearing Panel held a pre-hearing conference in which the parties made oral arguments in support of their positions with respect to laches. The Presiding Officer has considered the City's Brief and the Prosecution Team Responses, the party's supplemental submittals, and the oral arguments. The Presiding Officer issues the following Tentative Order. The Hearing Panel has been provided the briefs and tentative order for their deliberations at the May 17, 2010 hearing.

The Presiding Officer makes the following tentative findings, conclusions, and order:

The City asserts that although there may be no statutes of limitations that apply to this administrative proceeding, the doctrine of laches applies to bar the assessment of mandatory minimum penalties. The City asserts that the delay in assessing mandatory minimum penalties (back to 2003) was unreasonable and was prejudicial to the City. The Prosecution Team asserts that since the Water Board is obligated to assess mandatory penalties, laches cannot apply, and even if it could, any delay in assessing mandatory minimum penalties was reasonable due to staff resources limitations and enforcement priorities and that there was no prejudice to the City.

1. The laches defense may not apply to the case of mandatory minimum penalties.

The Prosecution Team objects to the City's assertion of the equitable defense of laches as not proper in this administrative proceeding. They argue that the equitable defense of laches cannot be used to avoid the imposition of statutorily mandated penalties, citing *Farahani v. San Diego Community College Dist.* (2009) Cal.App.4th 1486, 1494, and

Ghory v. Al-Lahhan (1989) 209 Cal.App.3d 1487, 1492; *Jiagbogu v. Mercedes Benz* (2004) 118 Cal.App.4th 1235, 1244. The Prosecution Team also asserts that the Regional Board has no discretion to reduce the amount of the penalty, citing State Water Board Order WQ 2007-0010 (*In the Matter of the Petition of Escondido Creek Conservancy and San Diego Coastkeeper*) pg. 4 ["The statute states that mandatory minimum penalties 'shall be assessed' for each serious violation. The plain language of the statute removes discretion from the water boards regarding the minimum amount that they must assess when a serious violation has occurred."] The Water Code allows three statutory defenses to mandatory penalties. The Prosecution Team points out that the City has not provided proof of any of those defenses.

The Prosecution Team also asserts that where it "would nullify or defeat a policy adopted for the public's protection, [laches] cannot be asserted against a governmental agency." (See *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493-494; *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 628.) They point out that the Water Code, Clean Water Act, and mandatory penalties constitute such a policy.

Based on the State Water Board Order, the Water Board may have no discretion to consider the laches defense raised by the City as argued by the Prosecution Team. However, as the State Water Board has not directly provided guidance on this issue, this Tentative Order makes no conclusion with respect to whether laches may not be considered in a mandatory penalty case, and considers the Parties' arguments with respect to laches.

2. Even if the laches defense could apply it does not apply in this matter.

The Legislature has adopted a comprehensive set of limitation periods within which actions must be brought to court or deemed abandoned, but these limitations do not apply to administrative actions. The statutes of limitation are found in the California Code of Civil Procedure, section 312 et seq. These provisions apply only to "actions." For purposes of those statutes, an action is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Code Civ. Proc., § 22). Because administrative proceedings do not proceed in a court of justice, they do not fall within the code definition of an action. For this reason, the statutes of limitation in the Code of Civil Procedure do not apply to administrative proceedings of the Regional Board. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 48. (See also *Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal. App. 4th 1357, 1361-1362, 72 Cal. Rptr.2d 180; *Little Company of Mary Hospital v. Belshe* (1997) 53 Cal. App.4th 325, 329, 61 Cal.Rptr.2d 626; *BP America Production Co. v. Burton* (2006) 127 S. Ct. 638, 644 [reaching similar result that statutes of limitation do not apply to administrative proceedings under federal law absent express statutory provision].)

The City points out that courts have applied the equitable doctrine known as "laches" in the review of many administrative cases even where no statute of limitation applies. "Laches" is derived from a French term for negligence and stands for the principle that a person's failure to assert a right or claim, together with lapse of time and other circumstances, may prejudice an adverse party. A defendant asserting laches on plaintiff's part must show that plaintiff has acquiesced in defendant's wrongful acts and has unduly delayed seeking equitable relief to the prejudice of defendant." (*Gerhard v.*

Stephens (1968) 68 Cal. 2d 864, 904, 442 P. 2d 692.) In other words, laches can not be used unless the City shows (a) that the delay in issuing the Complaint has caused prejudice to the City and (b) that there was no reasonable cause for the delay.¹

The City asserts that the delay in issuing the Complaint is unreasonable and not excusable and has resulted in prejudice to the City. The City argues that although there may not be an applicable statute of limitations, the Water Board should rely on the three year statute of limitations found in Code of Civil Procedure section 338(i).²

The City also argues that the delay was unreasonable as a matter of fact. The City points out that the Prosecution Team had the City's self-monitoring reports in a timely manner and was, therefore, aware of the violations and that it had all the evidence to proceed. The City also asserts that three years is a reasonable time to assess penalties, given that it is not a time-consuming task. The City asserts that although the Water Board's enforcement resources may be limited, more than three years is unreasonable based on limited resources and enforcement priorities. The Water Board staff issued complaints in other matters that were more complicated, but issued them much more quickly, showing that it can act quickly (in less than 8 months in the case of the Malibu ACL).

The City also argues that the Water Board's delay was prejudicial. In essence, the City states that due to the delay in formal enforcement action, the City was induced to make further expenditures regarding the discharge issues related to Seaside Lagoon and the delay was in part responsible for the City's decision to not only keep Seaside Lagoon open until 2010 (when its NPDES permit expires), but to explore remodeling of the Lagoon (to a non-discharging facility). This resulted, the City states, in making vast, non-refundable expenditures based on the Water Board's delay.

The Prosecution Staff responded that the City has not been prejudiced by any delay in enforcement. As it notes: "The contents of the self-monitoring report indicating that effluent limit violations have occurred are immediately known or are immediately discoverable to the City or to its representatives. When effluent limit violations are immediately known or immediately discoverable to a permittee based on the Water Board's system of self-reporting, it is difficult to discern how a permittee is prejudiced when the permittee knew or should have known that it violated the terms of its permit." The Prosecution Team points out that the Water Board issued mandatory minimum penalties in 2002 against the City; the City was, therefore, aware of the types of

¹ See *Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786, 792). (The affirmative defense of laches requires unreasonable delay in bringing suit 'plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.' [Citation.] Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. " *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624).

² Further, the City argues that any delay beyond three years is "inexcusable as a matter of law" based on the three year statute that applies to civil cases. Since there is no applicable statute of limitations for this administrative proceeding, it is not appropriate to find that any delay beyond three years is inexcusable as a matter of law. If the legislature intended to apply a three year statute of limitations to administrative enforcement actions of the Water Board, it could have done so, as it has in other administrative actions. (*City of Oakland v. Public Employees' Retirement System*, (2002) 95 Cal.App.4th 29, 50.)

violations that could subject it to mandatory penalties, and, could evaluate for itself whether it was more beneficial to the City to continue to operate the Seaside Lagoon or close it down. Further, the City was not prejudiced due to costs incurred based on an assumption that the staff's failure to prosecute meant acquiescence to the violations. The Water Board issued two time schedule orders to provide an opportunity for the City to bring itself back into compliance without assessment of penalties. In addition, it would be unreasonable for the City to assume acquiescence because the Water Board is required to impose mandatory penalties. See State Water Board Order WQ 2007-0010.

The Prosecution Team also pointed out that any delay was reasonable and justified based on limited staff resources. The Prosecution Team pointed out that the enforcement unit is responsible for enforcement with respect to 547 NPDES permitted facilities that could be subject to mandatory penalties. The Prosecution Team noted that there have been as many as 11 staff conducting enforcement, at least 15 less than needed to effectively conduct enforcement activities. The Water Board has sought through the budget process to increase the number of enforcement staff. They must establish priorities and do so based on various factors, including environmental harm, level of evidence, and statutory mandates. In addition, statutory mandates affect the priorities of the enforcement unit.

Tentative Finding

The Water Board Hearing Panel finds that the Prosecution Team's delay in taking formal enforcement action beyond three years was neither unreasonable nor prejudicial. The Prosecution Team notified the City in September 2008 of the violations and the requirement to impose mandatory minimum penalties for violations that occurred between 2003 and 2008.³ The City was aware of the violations at the time it reported them to the Water Board. The violations are based on the City's own self-monitoring reports, so to say that it was not aware of the violations is incorrect. Included in the record is evidence that the City was assessed mandatory minimum penalties for violations in 2001 and 2002 and paid a penalty of \$45,000. In addition, the City requested and was granted two time schedule orders in 2007 and 2008 that provided for interim limits for certain constituents. The City had all the information available to it to make decisions on how to manage its facility. The delay in issuing the Complaint also was not unreasonable. The Prosecution Team was dealing with nearly 300 pending enforcement actions for mandatory minimum penalties. The Prosecution Team made reasonable efforts to notify and process mandatory penalties and also address other high priority enforcement matters.

The Prosecution Team's delay was not prejudicial to the City. The City cannot reasonably argue that it was not aware of the potential for mandatory minimum penalties and that it was prejudiced by the Prosecution staff's delay. Considerable Water Board attention has been paid to the City to address the City's compliance issues and to provide relief as allowed in the Water Code.

TENTATIVE ORDER OF THE PRESIDING OFFICER

Upon reviewing the objections and responses,

³ Settlement Offer No. R4-2008-0058-M, Sept. 15, 2008.

IT IS ORDERED that:

1. The request to delete certain violations based on laches is denied as the City has not demonstrated that the delay in bringing the complaint was unreasonable or prejudicial.
2. The proposed Administrative Civil Liability Order shall be revised to include the following finding:

“There is no evidence to conclude that the Permittee was substantially prejudiced by the passage of time between the dates that the Permittee reported the violations and the date of issuance of Complaint No. R4-2008-0058. The Permittee was aware of the violations at the time it reported them to the Regional Board. The Permittee had already been assessed mandatory minimum penalties prior to the penalties addressed in the Complaint and the Permittee was subject to time schedule orders that gave the City some relief from some of the mandatory minimum penalties. The Permittee had all the information available to it to make decisions on how to manage its facility. The delay in issuing the Complaint also was not unreasonable. The Regional Board staff’s limited enforcement resources and competing enforcement priorities provide a rational explanation for the delay. The delay benefitted the Permittee because it extended the time before payment of the mandatory minimum penalties was due. For these reasons, the delay was not unreasonable.”

Date: May 11, 2010



Madelyn Glickfeld,
Vice Chair and Presiding Officer
Los Angeles Regional Water Quality Control Board

EXHIBIT “27”

STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

In the matter of:)
)
Administrative Civil Liability Complaint)
No. R4-2008-0058-M)
City of Redondo Beach)
Seaside Lagoon)
_____)

ORDER ON LACHES DEFENSE RAISED BY THE CITY OF REDONDO BEACH

On April 19, 2010, Mr. Michael W. Webb, attorney for the City of Redondo Beach (City), submitted a Brief in Opposition to Administrative Civil Liability Complaint No. R4-2008-0058-M. On April 27, 2010, Ms. Mayumi E. Okamoto, attorney for the Prosecution Team of the Regional Water Quality Control Board, Los Angeles Region (Water Board), submitted the Prosecution Team Response to the City of Redondo Beach's April 19, 2010 Brief. On April 29, 2010, Ms. Okamoto reiterated her request for a pre-hearing conference to address the issue of laches.

Madelyn Glickfeld, Vice Chair for the Los Angeles Water Board and Presiding Officer of the Hearing Panel has considered the City's Brief and the Prosecution Team Responses with respect to laches and statute of limitations. For the reasons set forth herein, the City and the Prosecution Team may submit additional legal argument, evidence, and declarations with respect to laches to the Water Board by the close of business on May 6, 2010. The legal argument, evidence, and declarations shall be submitted in electronic format to the parties and to the Advisory Team.

1. The parties may submit additional legal argument, evidence and declarations to address the laches defense as set forth herein.

In summary, the City asserts that although there may be no statutes of limitations that apply to this administrative proceeding, the doctrine of laches applies to bar the assessment of mandatory minimum penalties. The Prosecution Team asserts that since the Water Board is obligated to assess mandatory penalties, laches cannot apply.

The Legislature has adopted a comprehensive set of limitation periods within which actions must be brought to court or deemed abandoned, but these limitations do not apply to administrative actions. The statutes of limitation are found in the California Code of Civil Procedure, section 312 et seq. These provisions apply only to "actions." For purposes of those statutes, an action is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Code Civ. Proc., § 22). Because administrative proceedings do not proceed in a court of justice, they do not fall within the code definition of an action. For this reason, the statutes of limitation in the Code of Civil Procedure do not apply to administrative proceedings. The Third Appellate District agreed with this analysis in *City of Oakland v. Public Employees' Retirement*

System (2002) 95 Cal.App.4th 29, 48. (See also *Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal .App .4th 1357, 1361-1362, 72 Cal .Rptr.2d 180; *Little Company of Mary Hospital v. Belshe* (1997) 53 Cal .App.4th 325, 329, 61 Cal.Rptr.2d 626; *BP America Production Co. v. Burton* (2006) 127 S .Ct. 638, 644 [reaching similar result that statutes of limitation do not apply to administrative proceedings under federal law absent express statutory provision].) No statute of limitation period has been adopted for the administrative enforcement actions of regional water boards.

The City acknowledges that no statute of limitation applies but argues, correctly, that courts have applied the equitable doctrine known as "laches" in the review of many administrative cases. "Laches" is derived from a French term for negligence and stands for the principle that a person's failure to assert a right or claim, together with lapse of time and other circumstances, may prejudice an adverse party. A defendant asserting laches on plaintiff's part must show that plaintiff has acquiesced in defendant's wrongful acts and has unduly delayed seeking equitable relief to the prejudice of defendant." (*Gerhard v. Stephens* (1968) 68 Cal. 2d 864, 904, 442 P. 2d 692.) On at least one occasion when considering the reasonableness of a delay, a court has looked to an analogous statute of limitations from the Code of Civil Procedure for guidance. (*City of Oakland v. Public Employees' Retirement System*, supra, 95 Cal .App .4th at p. 51; but see *Fahmy v. Medical Bd. Of California* (1995) 38 Cal.App.4th 810, 817, fn. 5 ["in the 10 years since *Brown v. State Personnel Bd.* (1985) 166 Cal .App .3d 1151] was decided, the section of the opinion applying a statute of limitations to a laches defense in an administrative setting has never been followed, except by the same court".)

In general, laches is unlikely to apply where the Water Board is required to impose mandatory minimum penalties, but could apply in some circumstances. The State Water Resources Control Board Office of Chief Counsel has stated that laches can not be used unless two factors are shown: (a) that the delay has caused prejudice to the City and (b) that there was no reasonable cause for the delay. The parties should focus their additional submittals on these two factors.

ORDER

Upon reviewing the objections and responses,

IT IS ORDERED that:

1. The City of Redondo Beach and the Prosecution Team may submit additional legal argument, evidence, and declarations on the issue of the laches defense.
2. These additional submittals shall address these two factors:
 - a. Whether the delay has caused prejudice to the City and
 - b. Whether there was reasonable cause for the delay.
3. These additional submittals must be submitted by 5:00 P.M. on May 6, 2010 in electronic format to each party and to Frances McChesney. You are not required to resubmit already submitted evidence or legal argument.

Date: April 30, 2010

Madelyn Glickfeld
Presiding Officer, Los Angeles
Regional Water Quality Control Board

EXHIBIT “28”

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STATE OF CALIFORNIA
REGIONAL WATER RESOURCES CONTROL BOARD
LOS ANGELES REGION

In the Matter of
ADMINISTRATIVE CIVIL LIABILITY
COMPLAINT R4-2008-0058-M ISSUED
TO THE CITY OF REDONDO BEACH
BY CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD, LOS
ANGELES REGION, REGARDING
SEASIDE LAGOON

**SUPPLEMENTAL BRIEF OF THE
CITY OF REDONDO BEACH IN
RESPONSE TO APRIL 30, 2010
ORDER ON LACHES DEFENSE
RAISED BY THE CITY OF REDONDO
BEACH**

[Declarations of Michael Witzansky and
Michael Shay filed concurrently herewith]

1 The City of Redondo Beach (the "City") respectfully provides this additional
2 briefing in response to the Order issued by Presiding Officer Madelyn Glickfeld on April
3 30, 2010 (the Order), regarding Administrative Civil Liability Complaint No. R4-2008-
4 0058-M (the "Complaint").

5 **I. THE REGIONAL BOARD BEARS THE BURDEN OF PROVING BOTH**
6 **THAT THE CITY WAS NOT PREJUDICED AND THAT THE BOARD'S**
7 **ADMITTED DELAY WAS NOT UNREASONABLE.**

8 It is well established that "in civil actions the defense of laches requires
9 unreasonable delay plus either acquiescence in the act about which plaintiff complains or
10 prejudice to the defendant resulting from the delay." *Brown v. State Personnel Bd.*
11 (*"Brown"*), 166 Cal.App.3d 1151, 1159 (1985). It is uncontroverted here that the City
12 did not acquiesce in the Regional Board's delay and untimely filing of the Administrative
13 Civil Liability ("ACL") Complaint. Consequently, the only relevant issues here are (1)
14 whether the Regional Board unreasonably delayed in filing its Complaint on February 16,
15 2010, which purports to address alleged violations that are over six years old, and (2)
16 whether the City was prejudiced by this significant delay.

17 "It is said that '[t]here is no fixed rule as to the circumstances that must exist or as
18 to the period of time which must elapse before the doctrine of laches can be appropriately
19 applied.' (*Brown v. State Personnel Board* (1941) 43 Cal.App.2d 70, 78, 110 P.2d 497.)
20 That is so because what generally makes delay unreasonable is that it results in
21 prejudice." *Brown, supra*, at 1159. Nonetheless, "there is one circumstance in which
22 unreasonable delay could be found as a matter of law." *Brown, supra*, at 1159. This
23 circumstance occurs when an analogous statute of limitation has been "borrowed" to
24 govern a situation in which no statute of limitation directly applies. The effect of
25 violating the analogous statute "is **to shift the burden to the plaintiff to prove that his**
26 **delay was excusable and that the defendant was not prejudiced thereby.**" *Brown,*
27 *supra*, at 1161, quoting *Curbelo v. Matson Navigation Co.*, 194 Cal.App.2d 305, 310
28 (1961) (bold added).

1 Here, as discussed in the City’s Brief in Opposition to Administrative Civil
2 Liability Complaint, it is appropriate to borrow the three year statute of limitation from
3 Code of Civil Procedure section 338(i). Section 338(i) is squarely analogous because its
4 three year limitation also applies to civil actions arising from the same statute (Water
5 Code section 13385) that the Regional Board relies upon for the authority to file this
6 ACL Complaint. Indeed, the Regional Board even admitted that “there exists a statute of
7 limitations governing an analogous action at law which may be borrowed as the outer
8 limit of reasonable delay for the purpose of laches.” (Opposition Brief, Exhibit 14 at 1.)

9 Arguably, only a one year statute of limitations applies to the Regional Board’s
10 ACL Complaint because the Regional Board enforces statewide water quality laws and
11 seeks to have the City pay an administrative penalty. (C.C.P. section 340.) Accordingly,
12 any alleged violations occurring prior to February 16, 2009 would not be timely.

13 Accordingly, as a result of the burden-shifting holding in *Brown*, **the Regional**
14 **Board** must demonstrate both that its delay was excusable and also that the City was not
15 prejudiced by its six-year delay in bringing this action. The Regional Board cannot meet
16 this burden.

17 **II. THE BOARD’S DELAY WAS UNREASONABLE.**

18 **A. The Delay Was Unreasonable as a Matter of Law.**

19 As discussed above, when the period of delay is longer than the borrowed statute
20 of limitations – here, three years under Code of Civil Procedure section 338(i) –
21 “unreasonable delay [can] be found as a matter of law.” *Brown v. State Personnel Bd.*,
22 166 Cal.App.3d 1151, 1159 (1995). The Regional Board has acknowledged that the three
23 year statute of limitations found in Code of Civil Procedure section 338(i) may apply
24 (Opp. Brief, Exhibit 14 at 1), and it is undisputed that the allegations in the ACL
25 Complaint relate to alleged violations that occurred well beyond three years ago.

26 Additionally, the actions of the Regional Board are untimely according to the State
27 Water Resources Control Board’s own November 17, 2009 Water Quality Enforcement
28 Policy. First, the Water Quality Enforcement Policy clearly states that the Water Boards

1 Accordingly, the City submits that the Board need proceed no further, and
2 can determine, as a matter of law, that laches applies and therefore the Regional Board's
3 Complaint is untimely.

4 **B. The Delay Was Unreasonable as a Matter of Fact.**

5 Assuming that the Board declines to hold that the Regional Board's six year delay
6 is not unreasonable as a matter of law, the City contends that there is ample evidence
7 from which the Board nonetheless can conclude that the delay was unreasonable as a
8 matter of fact.

9 "In determining whether a delay has been unreasonable [for the purpose of
10 determining if the doctrine of laches is applicable], the circumstances in each case must
11 be taken into consideration (*Hiatt v. Inland Finance Corp.*, 210 Cal. 293, 300 [291 P.
12 414]). Many factors may be involved, amongst which is the plaintiffs' knowledge of the
13 defendants' [allegedly] wrongful acts." *Butler v. Holman*, 146 Cal. App. 2d 22, 28 (1957)
14 (citations omitted). Because the City has a mandatory duty to timely produce monitoring
15 reports (wherein violations may be disclosed), and as the Regional Board has never
16 alleged that the City has failed to timely produce such reports, it is clear the Regional
17 Board received the City's monitoring reports soon after sampling occurred (i.e., less than
18 two months after the sampling at issue occurred). Thus, the Regional Board was (or
19 should have been) aware of the alleged violations starting approximately July 23, 2003.
20 The Complaint was filed February 16, 2010, approximately 6 years later. Because the
21 Regional Board's delay cannot have been based on delayed notice of the alleged
22 violations, this factor clearly cuts against considering the Regional Board's delay being
23 considered reasonable.

24 The argument regarding limited resources is nonsensical because it would always
25 allow the Regional Board to go back in time without any restrictions and to seek penalties
26 for past violations. In its September 17, 2008 Offer, the Regional Board contends that its
27 "staff's limited enforcement resources and competing enforcement priorities provide a
28 rational explanation for the delay." These points may provide an *explanation*, but they do

1 not provide a basis from which to conclude that the six year delay caused by the Regional
2 Board was *reasonable*.²

3 The Regional Board made a choice in allocating its resources as it did, and in
4 determining not to approach the City with the purported violations prior to September 17,
5 2008. There has been no suggestion, nor could there be, that the Regional Board was not
6 provided long before 2008 with the information that it needed to determine whether there
7 were any permit violations. The City conducted regular monitoring of the water at
8 Seaside Lagoon, and the reports detailing the results of that monitoring were provided to
9 the Regional Water Quality Control Board, Los Angeles Region, approximately 30 to 45
10 days after the sampling concluded. (Declaration of Michael Shay [“Shay Decl.”], ¶¶ 4-
11 5.) Despite timely receiving these monthly reports, the Regional Board failed to take any
12 action for six years and did not issue any ACL complaint in the seven years following the
13 resolution of a prior March 29, 2002 complaint. (Witzansky Decl., ¶ 6-9.) Yet, during
14 this period, the Regional Board had sufficient resources to investigate and issue to the
15 City of Malibu an ACL complaint within eight months of the alleged violation, in a
16 matter far more complicated than the one presented here. (ACL Complaint No. R4-2008-
17 0041-R, Opp. Brief, Exhibit 15.) Also, notably with respect to the prior 2002 ACL
18 Complaint issued to the City of Redondo Beach, that complaint was issued within two
19 years.

20 Moreover, it is not enough for the Regional Board to rely on purported “limited
21 enforcement resources and competing enforcement priorities” as justification for the
22

23 ² As discussed more fully in the City’s Brief in Opposition to Administrative Civil
24 Liability Complaint, in another equitable context, being “busy” and the pressure of the
25 legal business were not sufficient bases upon which a court would excuse a party’s failure
26 to comply with statutory deadlines. See *Lyons v. Swope*, 154 Cal.App.2d 598, 600
27 (1957). And, in the enforcement context particularly, the “usual press of business” is
28 even less of a justification for delay since “[e]nforcement of violations ... should be
based on relatively narrow fact situations requiring a minimum of discretionary decision
making or delay.” *City of Brentwood v. Cent. Valley Reg’l Water Control Bd.*, 123
Cal.App.4th 714, 723 (2004).

1 delay. All governmental entities, including the City, have limited resources. Under the
2 Regional Board's rationale, no delay – no matter how long – ever would be unreasonable;
3 the agency involved simply could assert that its limited resources were the cause of the
4 delay, and the delay would be excused.

5 Nor do purported “competing priorities” excuse the Regional Board's delay of
6 more than six years in addressing the alleged violations. The Regional Board's strategic
7 decision as to how to allocate its resources is just that – a choice. If the Regional Board
8 determined that this matter was not a high priority but now regrets that decision,
9 punishing the City through an ACL Complaint filed after a seven year delay is not the
10 solution. Alternately, if this matter always was a high priority to the Regional Board, it
11 should have allocated resources accordingly and addressed the alleged violations earlier.

12 The Regional Board is essentially arguing that it should not have to engage in the
13 same balancing of resources and competing priorities in which every other public agency
14 must engage, and that it should be allowed to pursue every possible allegation even
15 decades after the alleged violation and without fair notice to the relevant public entity.
16 This is neither fair nor does it constitute reasonable delay, and accordingly the Regional
17 Board's conduct is barred by the doctrine of laches.

18 Furthermore, even if it is true that the Regional Board is backlogged regarding
19 MMP enforcement, the Regional Board has failed to show any *specific* evidence that it
20 has attempted to assiduously address MMP enforcement to an extent that the application
21 of laches would be unjust. Generalized statements are not sufficient to excuse multi-year
22 delays, especially considering the alleged violations at issue (evident from self reporting)
23 appear to require no investigation and little legal or technical analysis or drafting (outside
24 of the use of previously drafted boilerplate).³ Accordingly, the Regional Board has failed

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26 ³ Indeed, the Regional Board had, prior to any of the alleged violations
27 herein, issued an ACL complaint to the City regarding Seaside Lagoon.
28 (Complaint No. R4-2002-0014, attached as Exhibit “7” to the City's Brief in
Opposition to Administrative Civil Liability Complaint No. R4-2008-0058-M).

1 to provide any specific evidence that would excuse the delay herein.

2

3 **III. THE BOARD'S DELAY PREJUDICED THE CITY.**

4 In addition to the Regional Board's delay being unreasonable on its face, the City
5 has been significantly prejudiced by the delay such that laches applies to bar the Regional
6 Board from proceeding with its ACL Complaint. Specifically, the City has been
7 prejudiced in the following respects:

8 First, critical evidence and witnesses essential to this proceeding are no longer
9 available, including lab staff and two of the City's prior employees who were key
10 administrative decision makers and who dealt with Seaside Lagoon. It is well established
11 that laches and statutes of limitation are designed "to promote justice by preventing
12 surprises through the revival of claims that have been allowed to slumber until evidence
13 has been lost, memories have faded, and witnesses have disappeared." *Brown, supra*, at
14 1161.

15 Several critical witnesses are no longer available. Michelson Lab conducts the
16 water quality sampling for Seaside Lagoon. Employees of Michelson Lab who ran tests
17 on Seaside Lagoon water samples prior to 2008 are no longer employed by that company.
18 (Shay Decl., ¶ 6.) . As a result, the City cannot interview any such individuals to
19 determine if such individuals followed proper testing protocols or otherwise inquire into
20 information pertaining to sampling at Seaside Lagoon for the alleged violations. (Shay
21 Decl., ¶ 7.) Greg Kind, who held the position of Director of Recreation and Community
22 Services for the City of Redondo Beach prior to January 2006 – and who would have
23 knowledge of these issues during the years in which the Regional Board alleges there
24 were permit violations – no longer works for the City and is not available as a witness.
25 (Witzansky Decl., ¶ 11.) In addition, Lou Garcia, the prior City Manager (until August
26 2004), who also would have had knowledge of these matters, has passed away.
27 (Witzansky Decl., ¶ 12.)

28

1 Further, Michelson Lab only retains its lab data for five years. (Shay Decl., ¶ 8.)
2 Consequently, relevant evidence related to the basis for the Board’s allegations against
3 the City no longer exists.

4 Accordingly, due to the Regional Board’s delay in bringing this action, the City
5 does not have available to it several critical witnesses.

6 Second, the City was forced to expend scarce public funds as a result of the
7 Regional Board’s conduct. It is undisputed that prior to the Regional Board’s issuance of
8 the February 16, 2010 ACL Complaint that is the subject of this proceeding, the City had
9 been working with the Regional Board regarding compliance with Seaside Lagoon’s
10 permit. (Witzansky Decl., ¶ 14.) In connection with these efforts, in 2007 the City
11 requested a Time Scheduling Order (“TSO”) with interim effluent levels the City could
12 meet. (Witzansky Decl., ¶ 15.) The purpose of the TSO and the elevated effluent
13 limitations was to allow the City enough time to study the cause of the alleged
14 exceedances and attempt to resolve any problems found, without incurring additional
15 penalties for exceedances under the effluent levels in Seaside Lagoon’s then-current
16 NPDES Permit. (Witzansky Decl., ¶ 16.) The Regional Board issued a TSO (TSO No.
17 R4-2007-0024) in response to the City’s request. (Witzansky Decl., ¶ 17.) This TSO
18 provided that from May 1, 2007, through January 31, 2008, the City’s Total Suspended
19 Solids (“TSS”) and Biochemical Oxygen Demand (“BOD”) limitations would be raised.
20 (Witzansky Decl., ¶ 18.)

21 During the period the TSO was in effect, the City complied with the effluent
22 limitations for TSS and BOD. (Witzansky Decl., ¶ 19.) The City then expended
23 significant resources on a study of the apparent exceedances during 2007 and prepared
24 and submitted a detailed report to the Regional Board. (Witzansky Decl., ¶ 20.) The City
25 would likely not have spent the money to conduct this study had it known that the
26 Regional Board intended to later issue an ACL Complaint for alleged violations going
27 back to 2002. (Witzansky Decl., ¶ 21.) Consequently, the City expended significant
28

1 public funds as a result of the Regional Board's delay in stating its true intentions with
2 respect to the alleged exceedances.

3 Third, the City opted not to shut down Seaside Lagoon in reliance on the Regional
4 Board's actions. Because the Regional Board had in the recent past worked with the City
5 by granting TSOs as opposed to issuing ACL complaints, the City believed the Regional
6 Board was going to work with the City to allow Seaside Lagoon to stay open while the
7 City made the necessary preparations to transition it to a non-discharging operation.
8 (Witzansky Decl., ¶ 23.) The City has contemplated simply shutting down Seaside
9 Lagoon many times because of issues related to effluent limitation compliance.
10 (Witzansky Decl., ¶ 24.) The City reasonably relied on the Regional Board's failure to
11 address outmoded effluent limitations concerns; had the Regional Board indicated any
12 interest in pursuing apparent violations that were years old, the City likely would have shut
13 Seaside Lagoon down. (Witzansky Decl., ¶ 25.) This is particularly true because Seaside
14 Lagoon is an operation that costs the City money, is operated on State owned property,
15 and is operated primarily for the benefit of people who live outside of Redondo Beach.
16 (Witzansky Decl., ¶ 26.)

17 Fourth, the City expended time and resources evaluating a remodel of Seaside
18 Lagoon based on the Regional Board's actions. The Regional Board's inaction was in
19 part responsible for the City's decision to not only keep Seaside Lagoon open until 2010
20 (when its NPDES Permit expires), but to expend resources preparing designs for
21 remodeling Seaside Lagoon to a non-discharging facility so it would remain open
22 seasonally without interruption. (Witzansky Decl., ¶ 27.)

23 Fifth, had the Regional Board taken action sooner, the actual number of purported
24 violations would have been fewer and the City's resulting exposure to liability would
25 have been significantly less. For example, had the Regional Board taken action regarding
26 the 2003 violations in a timely manner (*e.g.*, issued an ACL complaint by October 1,
27 2006), the City would have been put "on notice" that ACL could be a continuing cost of
28 operating Seaside Lagoon, and the City could have made the fiscal decision to close it

1 down. (Witzansky Decl., ¶ 28.) Had the City closed Seaside Lagoon on October 1,
2 2006, no further violations would have occurred after that date. (Witzansky Decl., ¶ 29.)

3 In short, the City made considerable, non-refundable expenditures of public funds
4 based on the Regional Board's conduct, and is now exposed to much greater liability than
5 it otherwise would have been due to the Regional Board's inexcusable delay of more than
6 six years. The City has been significantly prejudiced by the Regional Board's conduct
7 and delay.

8
9 **IV. THE REGIONAL BOARD'S BRIEFING AND THE ORDER FAIL TO**
10 **PROVIDE AUTHORITY SUFFICIENT TO PREVENT THE**
11 **APPLICATION OF LACHES**

12 The Regional Board's recent briefing⁴ raises several cases in an attempt to
13 challenge the application of the doctrine of laches to a governmental entity. *Not one of*
14 *those cases*, however, addresses the application of the doctrine of laches to a
15 governmental entity. Neither *Ghory v. Al-Lahham*, 209 Cal.App.3d 1487 (1989), nor
16 *Lass v. Eliassen*, 94 Cal.App. 175 (1928), both cited to at length by the Regional Board,
17 involve or discuss the doctrine of laches in any manner. Conversely, *Fountain Valley*
18 *Hosp. & Med. Ctr. v. Bonta'*, 75 Cal. App. 4th 316, 325 (1999), is on point, recent, and its
19 authoritative value has not been questioned by the Regional Board. The fact that
20 *Fountain Valley* is not raised in the Regional Board's Briefing is telling.

21 **A. The Regional Board Brief Cites to Irrelevant and Unpersuasive**
22 **Authority**

23 The Regional Board Brief states "it is an established legal maxim that equity does
24 not possess the power to disregard or set aside the express terms of legislation."
25

26 ⁴ Prosecution Team Objections to the City of Redondo Beach's April 19,
27 2010 Submission and Request for Pre-Hearing Conference ("Regional Board
28 Briefing").

1 (Regional Board Brief at 2, Ins. 15-17; citing 30 Cal. Jur. 3d Equity §16). This is a
2 misrepresentation of what the secondary source cited actually states. That is, the source
3 provides two propositions that Regional Board conflates: 1) “a fundamental maxim is that
4 equity follows the law” (i.e., *aequitas legem sequitur*) and 2) “[e]quity does not possess
5 the power to disregard or set aside the express terms of legislation.” 30 Cal. Jur. 3d
6 Equity §16. Aside from the fact that a trial court has the “inherent power independent of
7 statutory provisions to dismiss an administrative proceeding when the proceeding is not
8 diligently prosecuted[,]”⁵ neither of the admittedly similar propositions mentioned above
9 is relevant here.

10 The first proposition is based on cases where a party tried to obtain an equitable
11 remedy, but an adequate legal remedy was already in place. *See Bi-Rite Meat &*
12 *Provisions Co. v. City of Hawaiian Gardens*, 156 Cal. App. 4th 1419, 1433 n.12 (2007)
13 (citing *Lass v. Eliassen*, 94 Cal. App. 175, 179 (1928)), and stating “an equitable remedy
14 is not intended to take the place of a legal remedy, but rather to provide recourse where
15 no remedy at law is available[. Here,] the Relocation Assistance Act and the California
16 Code of Regulations provided specific legal remedies for parties in [plaintiff’s]
17 situation.”). In the instant matter, there is no remedy (defense) at law for the City.
18 Accordingly, seeking relief under equitable principles is proper.

19 The second proposition refers to a situation where a plaintiff seeks equitable relief
20 “in matters that are plain and fully covered by positive statute.” *Armstrong v. Picquelle*,
21 15 Cal. App. 3d 122, 129 (1984) (stating that equity would not allow a plaintiff to obtain
22 more than 7% interest on an implied loan agreement because 7% was, at the time, stated
23 as the legal limit for such interest under the California Constitution) (citing *Marsh v.*
24 *Edelstein*, 9 Cal. App. 3d 132 (1970)). Again, there is no “positive statute” to protect the
25 City from dilatory prosecution of administrative penalties. Thus, the authority cited by

26 _____
27 ⁵ *Robert F. Kennedy Med. Ctr. v. Belshe*, 13 Cal. 4th 748, 760 n.9 (1996)
28 (citation omitted).

1 the Regional Board is of no relevance to the City's ability to apply the doctrine of laches
2 in this matter.

3 Based on the foregoing, it is easy to distinguish each of the cases cited in the
4 Regional Board Brief regarding Regional Board's argument that the doctrine of laches is
5 unavailable to the City. (Regional Board Brief at 2, Ins. 17-18.)

6 **1) Ghory v. Al-Lahham**

7 For example, Regional Board cites *Ghory v. Al-Lahham*, 209 Cal. App. 3d 1487,
8 1492 (1989), a case that deals with neither laches nor an administrative agency, for the
9 proposition that "principles of equity cannot be used to avoid a statutory mandate."
10 (Regional Board Brief at 2, Ins. 18-19; citing *Ghory*, 209 Cal. App. 3d at 1492). In
11 *Ghory*, a former employee brought a claim against his former employer for unpaid
12 overtime wages. *Ghory*, 209 Cal. App. 3d at 1489. The employer argued that it and the
13 former employee had contractually agreed to the hours that would be worked, and
14 payment for overtime hours beyond the terms of the contract would amount to unjust
15 enrichment. *Id.* at 1492. Because the relevant statute *expressly* states that an employee
16 can seek unpaid overtime wages "*notwithstanding any agreement to work for a lesser*
17 *wage[.]"* the *Ghory* court denied the former employer's attempt to invoke the equitable
18 doctrine of unjust enrichment. Thus, *Ghory* stands for the proposition that an equitable
19 claim cannot succeed when it is based on a fact that is expressly deemed irrelevant by
20 statute.

21 *Ghory* is distinguishable from the instant matter for several reasons. First, it has
22 nothing to do with laches or the application thereof to a governmental entity.

23 Second, the application of laches in this matter would not conflict with the
24 *assessment* of MMPs (the alleged "mandatory duty"); it would prohibit the Regional
25 Board from *collecting* MMPs. Assessment and collection are two different things,⁶ as a
26

27 ⁶ See also *Thompson v. Allen County*, 115 U.S. 550 (1885) (indicating
28 assessment and collection are two different tasks). Indeed, the Internal Revenue

(...continued)

1 moment of thought will prove. For example, the Regional Board can *assess* MMPs to a
2 bankrupt company, but the fact the Regional Board may not be able to *collect* those
3 MMPs does not mean the Regional Board failed its "mandatory duty"⁷ under Water Code
4 section 13385(h) or (i). Though the Regional Board *is permitted* to apply "for a judgment
5 to collect the civil liability" (i.e., ACL), there is no statutory mandate that the Regional
6 board must do so. *See* Water Code § 13328.⁸

7 Third, *Ghory* represents a scenario where the legislature adopted an express
8 provision to prevent *exactly the kind of equitable argument at issue* in that case. Here, in
9 contrast, the Regional Board does not (and cannot) allege that the MMP provisions at
10 issue (i.e., Water Code section 13385(h), (i)) were made mandatory for the purpose of
11 thwarting the application of the doctrine of laches.⁹ *Ghory* is not even remotely on
12 point,¹⁰ and should not be considered relevant to the issue of laches herein.

13 _____
14 (...continued)
15 Code has different chapters for "assessment" (Chapter 63) and "collection"
(Chapter 64).

16 ⁷ Even if it is true that the Regional Board has a duty to make the
17 assessments at issue, *Fountain Valley* appears to allow for the application of
18 laches where a "statutory mandate" is at issue (reimbursements under Medi-Cal).
See Fountain Valley, 75 Cal. App. 4th at 320.

19 ⁸ The Regional Board can also request the Attorney General "petition the
20 appropriate court to collect any liability or penalty imposed pursuant to [Section
21 13385,]" but the Regional Board is under no mandate to do so. Water Code §
13385(m).

22 ⁹ Regional Board argues that "had the legislature intended laches to be
23 recognized affirmative defense, it would have included it as a recognized
24 affirmative defense in Water Code section 13385, subdivision (j)." (Regional
25 Board Brief at 4, Ins. 19-21). This argument is unreasonable; if it was correct
26 then a party could not could not raise defenses like fraud, vagueness, res judicata,
and settlement in response to an ACL complaint.

27 ¹⁰ The Regional Board also cites to *Jiagbogu v. Mercedes Benz*, 118 Cal.
28 App. 4th 1235, 1244 (2004) for basically the same reason as it cites *Ghory*
(*Jiagbogu* cites to *Ghory*). Just like *Ghory*, *Jiagbogu* does not deal with the

(...continued)

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2) Lass v. Eliassen

The Regional Board Brief (and several of the cases cited in the abovementioned section of California Jurisprudence) relies heavily on *Lass v. Eliassen*, 94 Cal. App. 175, 179 (1928). The plaintiff in *Lass*, the purchaser of a decedent's real property, sought to obtain certain rental fees collected by the executor of the decedent's estate. *Id.* The executor obtained the rental fees in the period of time between when Lass agreed to buy the decedent's real property, and when that sale became final under the law (i.e., "confirmation"). *Id.* The *Lass* court held that the title of the decedent's real property passed upon confirmation by statute, and that no equitable argument could change that fact. *Id.* Again, aside from the fact that this case is over eighty years old and has been cited infrequently at best, it is not a case that addresses either laches or the application of that doctrine against an administrative agency.

Also, *Lass* addresses "matters that are plain and fully covered by a positive statute[,]" something that is not at issue here, as the potential application of laches is not why the penalties under section 13385(h),(i) are mandatory.¹¹ Finally, because assessment is not the same as collection, there is no conflict between the application of equitable relief and a statutory mandate. *Lass* is not relevant to this matter, and should be disregarded.

(...continued)
application of laches or a governmental agency, but instead addresses a defendant attempting to make an improbable unjust enrichment claim regardless of a statute obviously aimed at preventing such defendant from benefiting from its own wrong. Accordingly, *Jiaghogu* is inapposite.

¹¹ The penalties are mandatory to help encourage "swift and timely enforcement[,]" not to prevent the application of laches. See Stats. 1999, ch. 93, § 2 subd. (d) [Sen. Bill 709]. The application of laches, by its nature, *can never* preclude swift and timely enforcement; laches inherently requires unreasonable delay. The application of laches actually supports "swift and timely enforcement" because the threat of stale claims being defeated on laches grounds should result in less claims going stale.

1 **B. Fahmy v. Med. Bd. of California Is Inapposite and Irrelevant**

2 The Order cites the statement in *Fahmy v. Med. Bd. of California*, 38 Cal. App.
3 4th 810, 817 n.5 (1995) statement that “in the 10 years since *Brown* was decided, the
4 section of the opinion applying a statute of limitations to a laches defense in an
5 administrative setting has never been followed, except by the same court” Even if
6 this statement were factually correct when made, it is irrelevant here for several reasons.
7 First and foremost, *Brown’s* borrowing rule has not only been followed outside of its own
8 district (the 3rd), but has been followed in the district that would hear any appeal that
9 arose from the instant matter. *See, e.g., Fountain Valley*, 75 Cal. App. 4th at 316 (1999)
10 (in Division Seven of District Two, the appellate district for matters in Los Angeles
11 County).

12 Second, the footnote in *Fahmy* is dicta beyond the issue that was before the *Fahmy*
13 court: whether borrowing of a statute of limitations should be allowed in a *license*
14 *revocation hearing*. *Fahmy*, 38 Cal. App. 4th at 817. *Fahmy* makes it abundantly clear
15 that there is an important difference between a license revocation hearing (which is aimed
16 at protecting the public from future harm), and criminal and civil actions¹² (which are
17 intended to punish or compensate, respectively, for past behavior). *See id.* Thus, though
18 dicta, *Fahmy’s* discussion comparing license revocation to civil and criminal actions
19 actually suggests that, as to *civil* matters (as opposed to license revocation hearings),
20 *Brown’s* borrowing rule may be appropriate.

21 _____
22 ¹² Though “[a]dministrative proceedings are civil in nature[.]” (*Lam v.*
23 *Bureau of Sec. & Investigative Servs.*, 34 Cal. App. 4th 29, 38 (1995)), that
24 truism seems to fail in the instant matter, where the Regional Board is attempting
25 to enforce a law that requires penalty amounts unrelated to any compensation
26 analysis. When a regulatory scheme is “so punitive in nature or effect that it must
27 be found to constitute punishment” its considered a “criminal penalty,” even if the
28 legislature itself “denominated [it] a civil remedy.” *See People v. Alford*, 42 Cal.
4th 749, 755 (2007) (citations omitted). Thus, City reiterates the argument that
an analogous statute of limitation for violations of the Water Code (in this
instance, three years, per Penal Code section 801) should be borrowed.

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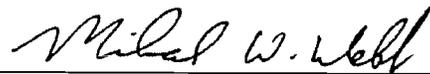
V. CONCLUSION

The Regional Board's own Water Quality Enforcement Policy states mandatory minimum penalties should be issued in *eighteen months* or less. The Regional Board is currently seeking penalties for alleged violations that occurred, in some cases, over *seventy-two* months prior to the Complaint. Such a delay worked a serious prejudice on the City, which could have avoided thousands of dollars in future penalties and investigation costs and would have had necessary witnesses available in order to investigate and properly defend against the charges raised in the ACL Complaint had the Regional Board acted within at least the three-year standard that should be applied herein.

Simply put, there is no reasonable explanation as to why it would take nearly seven years to issue a complaint of fifteen pages (or less), especially based on the fact that complaints are based on self reporting and full of standard "boiler plate" language. In fact, the Regional Board's delay is, under applicable case law, presumed prejudicial and unreasonable. Because the Regional Board's delay directly created prejudice in hampering the City's ability to defend itself against these charges and in the form of wasted municipal funds, and because the press of business cannot justify failing to issue a simple complaint within three years of an alleged violation, the doctrine of laches bars the Regional Board from seeking penalties for alleged violation occurring before February 16, 2007.

DATED: May 6, 2010

MICHAEL W. WEBB
CITY ATTORNEY
CITY OF REDONDO BEACH

By: 

Michael W. Webb
Attorneys for
CITY OF REDONDO BEACH

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STATE OF CALIFORNIA

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REGIONAL WATER RESOURCES CONTROL BOARD

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LOS ANGELES REGION

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In the Matter of

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ADMINISTRATIVE CIVIL LIABILITY
COMPLAINT R4-2008-0058-M ISSUED
TO THE CITY OF REDONDO BEACH
BY CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD, LOS
ANGELES REGION, REGARDING
SEASIDE LAGOON

18

**DECLARATION OF MICHAEL
WITZANSKY IN SUPPORT OF
SUPPLEMENTAL BRIEF OF THE
CITY OF REDONDO BEACH IN
RESPONSE TO ORDER ON LACHES
DEFENSE RAISED BY THE CITY OF
REDONDO BEACH ISSUED APRIL
30, 2010**

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1 7. After settling the 2002 ACL Complaint, the City continued to provide
2 monitoring reports to the Regional Board pursuant to Seaside Lagoon's NPDES permit.

3 8. The Regional Board now contends that some of those reports going back to
4 2002 included monitoring results that subject the City to liability.

5 9. The Regional Board, however, did not issue any ACL Complaint regarding
6 the alleged violations in the seven years after the ACL Complaint of March 29, 2002.

7 10. In addition to the foregoing examples of prejudice, several of the City's
8 prior employees who dealt with Seaside Lagoon and who could be called as witnesses are
9 no longer available.

10 11. Greg Kind, who held the position of Director of Recreation and Community
11 Services for the City of Redondo Beach prior to January 2006 – and who would have
12 knowledge of these issues during the years in which the Regional Board alleges there
13 were permit violations – no longer works for the City and is not available as a witness.

14 12. In addition, Lou Garcia, the prior City Manager (until August 2004), who
15 also would have had knowledge of these matters, has passed away.

16 13. Accordingly, due to the Regional Board's delay in bringing this action, the
17 City does not have available to it several witnesses, including two key administrative
18 decision makers.

19 14. Prior to the Regional Board's issuance of the February 16, 2010 ACL that
20 is the subject of this proceeding, the City had been working with the Regional Board
21 regarding compliance with Seaside Lagoon's permit.

22 15. For example, in 2007, the City requested a Time Scheduling Order ("TSO")
23 with interim effluent levels the City could meet.

24 16. The purpose of the TSO and the elevated effluent limitations was to allow
25 the City enough time to study the cause of the alleged exceedances and attempt to resolve
26 any problems found, without incurring additional penalties for exceedances under the
27 more restrictive effluent levels in Seaside Lagoon's then-current NPDES Permit.

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- 1 17. The Regional Board issued TSO No. R4-2007-0024 in response to the
2 City's request.
- 3 18. The TSO provided that from May 1, 2007, through January 31, 2008, the
4 City's Total Suspended Solids and Biochemical Oxygen Demand limitations would be
5 raised.
- 6 19. During the period the TSO was in effect, the City complied with the
7 effluent limitations for TSS and BOD.
- 8 20. The City then expended significant resources on a study of the apparent
9 exceedances during 2007 and prepared and submitted a detailed report to the Regional
10 Board.
- 11 21. The City would likely not have spent the money to conduct this study had it
12 known that the Regional Board intended to later issue an ACL for alleged violations
13 going back to 2002.
- 14 22. As a result of the Regional Board waiting over six years to raise alleged
15 violations, the City has been prejudiced by making additional expenditures that the City
16 otherwise would have avoided. The City was induced to make further expenditures
17 regarding studies done and reports prepared concerning the water discharge issues related
18 to Seaside Lagoon.
- 19 23. Because the Regional Board had in the recent past worked with City by
20 granting TSOs as opposed to issuing ACL complaints, the City believed the Regional
21 Board was going to work with the City to allow Seaside Lagoon to stay open while the
22 City made the necessary preparations to transition to a non-discharging operation.
- 23 24. The City has contemplated simply shutting down Seaside Lagoon many
24 times because of issues related to effluent limitation compliance.
- 25 25. The City relied on the Regional Board's failure to address outmoded
26 effluent limitations concerns; had the Regional Board indicated any interest in pursuing
27 apparent violations that were years old, the City likely would have shut Seaside Lagoon
28 down.

1 26. This is particularly true because Seaside Lagoon is an operation that costs
2 the City money, is operated on State owned property, and is operated primarily for the
3 benefit of people who live outside of Redondo Beach.

4 27. Furthermore, the Regional Board's inaction was in part responsible for the
5 City's decision to not only keep Seaside Lagoon open until 2010 (when its NPDES
6 Permit expires), but to expend resources preparing designs for remodeling Seaside
7 Lagoon to a non-discharging facility so it would remain open seasonally without
8 interruption.

9 28. Had the Regional Board taken action regarding the 2003 violations in a
10 timely manner (e.g., issued an ACL complaint by October 1, 2006), the City would have
11 been put "on notice" that ACL would be a continuing cost of operating Seaside Lagoon,
12 and the City could have made the fiscal judgment to close it down.

13 29. Had the City closed Seaside Lagoon on October 1, 2006, no further
14 violations would have occurred after that date.

15 I declare under penalty of perjury under the laws of the State of California that the
16 foregoing is true and correct.

17 Executed this 6th day of May, 2010 at Redondo Beach, California.

18 

19 _____
20 Michael Witzansky

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8 STATE OF CALIFORNIA
9 REGIONAL WATER RESOURCES CONTROL BOARD
10 LOS ANGELES REGION
11

12 In the Matter of
13 ADMINISTRATIVE CIVIL LIABILITY
14 COMPLAINT R4-2008-0058-M ISSUED
15 TO THE CITY OF REDONDO BEACH
16 BY CALIFORNIA REGIONAL WATER
17 QUALITY CONTROL BOARD, LOS
18 ANGELES REGION, REGARDING
19 SEASIDE LAGOON

**DECLARATION OF MICHAEL SHAY
IN SUPPORT OF SUPPLEMENTAL
BRIEF OF THE CITY OF REDONDO
BEACH IN RESPONSE TO ORDER
ON LACHES DEFENSE RAISED BY
THE CITY OF REDONDO BEACH
ISSUED APRIL 30, 2010**

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8. Michelson Lab, which conducts the water quality sampling for Seaside Lagoon, only retains its lab data for five years.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 6th day of May, 2010 at Redondo Beach, California.



Michael Shay

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Christina Sanchez, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On May 6, 2010, I served the foregoing document(s) described as

**SUPP. BRIEF OF THE CITY OF REDONDO BEACH IN RESPONSE TO APRIL 30, 2010
ORDER ON LACHES DEFENSE RAISED BY REDONDO BEACH ;
DECLARATION OF MICHAEL WITZANSKY;
DECLARATION OF MICHAEL SHAY**

on the interested parties in this action by placing
[] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Mokamoto@waterboards.ca.gov;
Tcobb@waterboards.ca.gov;
FmcChesney@waterboards.ca.gov;

— (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

Executed on May 6, 2010, at Long Beach, California.

X (VIA ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission. Said transmission was reported and completed without error.

Executed on May 6, 2010, at Long Beach, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


CHRISTINA SANCHEZ

EXHIBIT “29”

STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

In the matter of:)
)
Administrative Civil Liability Complaint)
No. R4-2008-0058-M)
City of Redondo Beach)
Seaside Lagoon)
_____)

ORDER ON LACHES DEFENSE RAISED BY THE CITY OF REDONDO BEACH

On April 19, 2010, Mr. Michael W. Webb, attorney for the City of Redondo Beach (City), submitted a Brief in Opposition to Administrative Civil Liability Complaint No. R4-2008-0058-M. On April 27, 2010, Ms. Mayumi E. Okamoto, attorney for the Prosecution Team of the Regional Water Quality Control Board, Los Angeles Region (Water Board), submitted the Prosecution Team Response to the City of Redondo Beach’s April 19, 2010 Brief. On April 29, 2010, Ms. Okamoto reiterated her request for a pre-hearing conference to address the issue of laches. On May 6, 2010, both parties supplemented their submittals with respect to the issues of laches. On May 10, 2010, in an email message to Frances McChesney, legal counsel for the Water Board Advisory Team, the City requested that the action be dismissed based on a faulty public notice.

On May 11, 2010, Madelyn Glickfeld, Vice Chair for the Los Angeles Water Board and Presiding Officer of the Hearing Panel held a pre-hearing conference in which the parties made oral arguments in support of their positions with respect to laches and the notice issue raised by the City. Michael Webb, Scott Franklin, and W. Lee Smith represented the City. Mayumi Okamoto and Jennifer Fordyce were present for the Prosecution Team. Tracy Egoscue, the Executive Officer, Frances McChesney, legal counsel, and Jennifer Chou, technical advisor, were present for the Advisory Team.

The Presiding Officer has considered the City’s Brief and the Prosecution Team Responses, the parties’ supplemental submittals, and the oral arguments. The Presiding Officer issues the following Order. The Hearing Panel will be provided the briefs and this order for their deliberations at the May 17, 2010 hearing.

The Presiding Officer makes the following findings, conclusions, and order:

1. Notice. The City asserts that the public hearing notice refers to a permit for a different facility and the notice is therefore in error and not adequate to inform the public about the allegations. The City requests that the violations be withdrawn and dismissed. The Prosecution Team responds that the Complaint in this matter is accurate, that the public notice accurately reported the correct permit in the preceding sentence, and that the public has received this notice and others and there has been substantial information in the press about this matter. Therefore the notice is adequate.

The Presiding Officer considered the arguments made by the two parties and hereby denies the City’s request to dismiss the action, finding that the error in referencing the

applicable NPDES permit did not deny the City or the public of due process. The City was adequately notified of the allegations that were clearly set forth in the Complaint and responded to those allegations. The public was provided notice sufficient to comply with the Water Code and the Bagley-Keene Act.

2. Laches. Complaint No. R4-2008-0058-M proposes to assess mandatory minimum penalties for alleged violations that occurred between 2003 and 2008. In 2008, the Prosecution Team made an offer to the City to settle those penalties. The City declined the offer and in 2010, the Prosecution Team issued the Complaint in this matter. The City asserts that the Prosecution Team waited too long to assess some of the penalties alleged in the Complaint and that they should be dismissed, arguing that the Water Board should consider a "borrowed" statute of limitations that applies to actions in court.

The Legislature has adopted a comprehensive set of limitation periods within which actions must be brought to court or deemed abandoned, but these limitations do not apply to administrative actions. The statutes of limitation are found in the California Code of Civil Procedure, Section 312 et seq. These provisions apply only to "actions." For purposes of those statutes, an action is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Code Civ. Proc., § 22).

Because administrative proceedings do not proceed in a court of justice, they do not fall within the code definition of an action. For this reason, the statutes of limitation in the Code of Civil Procedure do not apply to administrative proceedings of the Regional Board. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 48. (See also *Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal .App .4th 1357, 1361-1362, 72 Cal .Rptr.2d 180; *Little Company of Mary Hospital v. Belshe* (1997) 53 Cal .App.4th 325, 329, 61 Cal.Rptr.2d 626; *BP America Production Co. v. Burton* (2006) 127 S .Ct. 638, 644 [reaching similar result that statutes of limitation do not apply to administrative proceedings under federal law absent express statutory provision].)

The City asserts that although there may be no statutes of limitations that apply to this administrative proceeding, the doctrine of laches applies to bar the assessment of mandatory minimum penalties. The City asserts that the delay in assessing mandatory minimum penalties (back to 2003) was unreasonable and was prejudicial to the City. The City asserts that since many of the alleged violations occurred more than three years ago (using the "borrowed statute of limitations in section 338), the equitable defense of laches applies to this matter and that certain of the alleged violations must therefore be dismissed. The City points out that courts have applied the equitable doctrine known as "laches" in the review of many administrative cases even where no statute of limitation applies.

"Laches" is derived from a French term for negligence and stands for the principle that a person's failure to assert a right or claim, together with lapse of time and other circumstances, may prejudice an adverse party. A defendant asserting laches on plaintiff's part must show that plaintiff has acquiesced in defendant's wrongful acts and has unduly delayed seeking equitable relief to the prejudice of defendant." (*Gerhard v. Stephens* (1968) 68 Cal. 2d 864, 904, 442 P. 2d 692.) In other words, laches can not be

used unless the City shows (a) that the delay in issuing the Complaint has caused prejudice to the City and (b) that there was no reasonable cause for the delay.¹ The City also asserts that the case of *Fountain Valley Hosp. & Med. Ctr. V. Bonta*, 75 Cal.App.4th 316 (1999), is on point, recent and not questioned by the Prosecution Team. That case applied the doctrine of laches to an administrative agency for delay in dismissing a professor for misconduct.

The Prosecution Team objects to the City's assertion of the equitable defense of laches as not proper in this administrative proceeding. They argue that the equitable defense of laches cannot be used to avoid the imposition of statutorily mandated penalties, citing *Farahani v. San Diego Community College Dist.* (2009) Cal.App.4th 1486, 1494, and *Ghory v. Al-Lahhan* (1989) 209 Cal.App.3d 1487, 1492; *Jiagbogu v. Mercedes Benz* (2004) 118 Cal.App.4th 1235, 1244. The Prosecution Team also asserts that the Water Board has no discretion to reduce the amount of the penalty, citing State Water Resources Control Board Order WQ 2007-0010 (*In the Matter of the Petition of Escondido Creek Conservancy and San Diego Coastkeeper*) pg. 4 ["The statute states that mandatory minimum penalties 'shall be assessed' for each serious violation. The plain language of the statute removes discretion from the water boards regarding the minimum amount that they must assess when a serious violation has occurred."] California Water Code section 13385(j)(1) provides for statutory defenses to mandatory penalties.² The Prosecution Team points out that the City has not provided proof of any of those defenses.

The Prosecution Team also asserts that where it "would nullify or defeat a policy adopted for the public's protection, [laches] cannot be asserted against a governmental agency." (See *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493-494; *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 628.) They point out that the Water Code, Clean Water Act, and mandatory penalties constitute such a policy. Further, they point out that violation of the Clean Water Act is per se a public nuisance and laches should not be allowed as a defense.

I have considered the briefs and oral arguments in this matter. As stated by the State Water Board in Order WQ 2007-0010 (Escondido Creek Conservancy), the Water Board is obligated to assess mandatory minimum penalties. Although that Order does not directly address the defense of laches, the State Water Board has clearly directed that the Water Code requires assessment of mandatory penalties unless one of the stated statutory exemptions applies and allows little discretion to the Regional Water Boards. The City has presented no evidence that supports applying any of the statutory exceptions to the assessment of mandatory penalties set forth in Water Code section 13385(j)(1). Further, the record makes clear that the alleged violations are based on the

¹ See *Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786, 792). (The affirmative defense of laches requires unreasonable delay in bringing suit 'plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.' [Citation.] Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. " *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624).

² Three of the statutory defenses are (1) an act of war; (2) an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight; (3) an intentional act of a third party, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

City's self-monitoring reports so it was aware of the violations; the City has been assesses mandatory penalties in the past so is aware of the consequences of the violations, and the City has requested and been issued time schedule orders to relieve it from some of the mandatory minimum penalties. In addition, the *Fountain Valley* case does not concern a situation of penalties mandated by law, and is not controlling.

Therefore, I find that consistent with direction from the State Water Board, the equitable doctrine of laches does not apply to this matter of mandatory minimum penalties.

As these issues have been adequately briefed and the documents are in the record, I do not intend to provide additional time at the hearing to provide additional testimony on this issue, but will allow time for objections to this order.

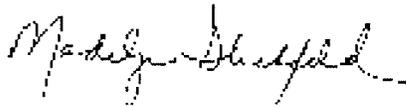
ORDER OF THE PRESIDING OFFICER

Upon reviewing the objections and responses,

IT IS ORDERED that:

1. The City's request to delete certain violations based on laches is denied as the equitable doctrine of laches is not appropriate to apply in this case of mandatory minimum penalties.
2. The City's request to dismiss violations based on an inadequate notice is denied.
3. The Parties shall each have 60 minutes at the hearing to present testimony, rebuttal, cross-examination, and closing arguments and can request additional time at the hearing as appropriate. The parties will have five minutes each at the hearing to state their objections or responses to this Order. I will provide no additional time at the hearing to have additional testimony or evidence on the laches issue. The submittals on this issue will be included in the record.

Date: May 13, 2010



Madelyn Glickfeld,
Vice Chair and Presiding Officer
Los Angeles Regional Water Quality Control Board

EXHIBIT “30”

HEARING PANEL REPORT AND PROPOSED ORDER

City of Redondo Beach, Seaside Lagoon
ACL Complaint No. R4-2008-0058-M

This matter was heard on May 17, 2010 in Los Angeles, California before a panel consisting of Regional Board Members Ms. Madelyn Glickfeld (Chair), Ms. Francine Diamond, Ms. Jeanette Lombardo, and Mr. Steve Blois. Mr. Michael W. Webb, City Attorney, appeared on behalf of the City of Redondo Beach (Permittee). Mr. Samuel Unger, Mr. Russ Colby, and Ms. Mayumi Okamoto appeared for the Prosecution Team.

The Panel members make the following:

FINDINGS OF FACT

1. The Permittee owns and operates the Seaside Lagoon (facility) located at 200 Portofino Way, Redondo Beach, California. The facility is a 1.4 million gallon man-made saltwater lagoon which provides recreational services to the public. Water is supplied from a cooling water discharge outfall owned and operated by AES Redondo Beach, LLC Power Plant and chlorinated prior to entering the lagoon. To maintain the water level in the lagoon, the Permittee discharges up to 2.3 million gallons per day (MGD) of de-chlorinated wastewater to King Harbor, a navigable water of the United States.
2. The Permittee's wastewater discharges from the facility contain pollutants and are subject to the requirements and limitations set forth in California Water Code (CWC) § 13376 and Regional Board Order Nos. 99-057 and R4-2005-0016. CWC § 13376 prohibits the discharge of pollutants to surface waters, except as authorized by waste discharge requirements that implement the provisions of the Federal Clean Water Act. Order Nos. 99-057 and R4-2005-0016 set forth the waste discharge requirements and effluent limitations governing the discharges from the facility during the relevant period of time.
3. CWC § 13385(h)(1) requires the Regional Board to assess a mandatory minimum penalty of three thousand dollars (\$3,000) for each serious violation. Pursuant to CWC § 13385(h)(2), a "serious violation" is defined as any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant by 20 percent or more, or for a Group I pollutant by 40 percent or more. Appendix A of Part 123.45 of Title 40 of the Code of Federal Regulations specifies the Group I and II pollutants.
4. CWC § 13385(i) requires the Regional Board to assess a mandatory minimum penalty of three thousand dollars (\$3,000) for each violation whenever the permittee violates a waste discharge requirement effluent limitation in any period of six consecutive months, except that the requirement to assess the mandatory minimum penalty shall not be applicable to the first three violations within that time period.
5. The Prosecution Team identified fifty five (55) effluent limit violations of Order No. 99-057 and Order No. R4-2005-0016 in the Permittee's self-monitoring reports during the period May 2003 through July 2008. Out of the fifty five (55) violations, the Prosecution Team determined that fifty (50) were subject to mandatory minimum penalties. These violations include effluent limit exceedances for coliform and enterococcus bacteria, biochemical oxygen demanding substances (BOD₅), total residual chlorine (TRC), and total suspended solids (TSS).

6. On February 16, 2010, the Assistant Executive Officer issued Complaint No. R4-2008-0058-M against the Permittee for a mandatory minimum penalty in the amount of \$150,000 for those violations of waste discharge identified in Exhibit "A".
7. On April 27, 2010, the Prosecution Team sent a letter in response to the Permittee's April 19, 2010 Brief in Opposition to Administrative Civil Liability. The Prosecution Team considered the arguments raised by the Permittee in section III.C. of its Opposition Brief and reviewed the Permittee's "Sampling Time Summary." (City Exhibit 18.) Based on the arguments raised, the Prosecution Team modified Exhibit "A" (attached as Amended Exhibit "A") to twenty-four (24) effluent limit violations, twenty-two (22) of which are subject to mandatory minimum penalties in the amount of \$66,000.
8. On considering the written record and evidence presented at the hearing the Panel finds that there were eighteen (18) effluent limit violations, seventeen (17) of which are subject to mandatory minimum penalties in the amount of \$51,000. The Panel specifically finds that those violations occurred as reported by the Permittee.
9. The Chair of the Regional Board Hearing Panel issued two pre-hearing orders ruling on procedural objections raised by the City (April 29, 2010) and on the equitable defense of laches and due process issues raised by the City (May 13, 2010). The Panel considered the Chair's April 29 and May 13, 2010 Pre-hearing Orders.

CONCLUSIONS OF LAW

1. The discharges of effluent containing coliform and enterococcus bacteria, biochemical oxygen demanding substances (BOD₅), total residual chlorine (TRC), and total suspended solids (TSS) in excess of the effluent limitations of Order Nos. 99-057 and R4-2005-0016 into navigable waters of the United States, as found in Finding of Fact No. 8 and Amended Exhibit "A" constitute seventeen (17) violations of effluent limitations contained in Order Nos. 99-057 and R4-2005-0016.
2. There are no statutes of limitations that apply to this administrative proceeding. The statutes of limitations that refer to "actions" and "special proceedings" and are contained in the California Code of Civil Procedure apply to judicial proceedings, not administrative proceedings. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 405(2), p. 510.
3. Consistent with direction from the State Water Resources Control Board in Order WQ 2007-0010 (Escondido Creek Conservancy), the equitable doctrine of laches does not apply to mandatory minimum penalties.
4. \$51,000 is the mandatory minimum penalty amount that must be assessed against the Permittee under CWC § 13385 for the violations identified in Amended Exhibit "A".
5. The maximum amount of administrative civil liability assessable for the violations alleged in Complaint No. R4-2008-0058-M pursuant to CWC § 13385 is \$10,000 per day of violation plus \$10 times the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

RECOMMENDED MANDATORY MINIMUM PENALTY

The amount of \$51,000 should be imposed on the Permittee as a mandatory minimum penalty for the violations found herein to have been committed by the Permittee. A proposed Order on Complaint No. R4-2008-0058-M is attached.

Madelyn Glickfeld
Chair

Date

Attachments:

Amended Exhibit "A"

Proposed Order on Complaint No. R4-2008-0058-M

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

In the matter of:) Order on Complaint No. R4-2008-0058-M
) Mandatory Minimum Penalty
) for
City of Redondo Beach) Violation of California Water Code § 13376
Seaside Lagoon) and
200 Portofino Way) Order Nos. 99-057 and R4-2005-0016
Redondo Beach, CA) (NPDES No. CA0064297)

YOU ARE HEREBY GIVEN NOTICE THAT:

1. The Regional Water Quality Control Board, Los Angeles Region (Regional Board) has found and determined that the City of Redondo Beach (hereinafter Permittee) violated requirements contained in California Water Code (CWC) § 13376 and Order Nos. 99-057 and R4-2005-0016.
2. The Permittee owns and operates Seaside Lagoon (facility) located at 200 Portofino Way, Redondo Beach, California, which is subject to the waste discharge requirements and limitations set forth in Regional Board Order Nos. 99-057 and R4-2005-0016.
3. The Prosecution Team identified fifty five (55) effluent limit violations of Order No. 99-057 and Order No. R4-2005-0016 in the Permittee's self-monitoring reports during the period May 2003 through July 2008. Out of the fifty five (55) violations, the Prosecution Team determined that fifty (50) were subject to mandatory minimum penalties. These violations include effluent limit exceedances for coliform and enterococcus bacteria, biochemical oxygen demanding substances (BOD₅), total residual chlorine (TRC), and total suspended solids (TSS).
4. On February 16, 2010, the Assistant Executive Officer issued Complaint No. R4-2008-0058-M to the Permittee in the amount of \$150,000 for the fifty (50) effluent violations of Order Nos. 99-057 and R4-2005-0016 subject to mandatory minimum penalties, as identified in Exhibit "A" to Complaint No. R4-2008-0058-M.
5. On April 27, 2010, the Prosecution Team sent a letter in response to the Permittee's April 19, 2010 Brief in Opposition to Administrative Civil Liability. The Prosecution Team considered the arguments raised by the Permittee in section III.C. of its Opposition Brief and reviewed the Permittee's "Sampling Time Summary." (City Exhibit 18.) Based on the arguments raised, the Prosecution Team modified Exhibit "A" to twenty four (24) effluent limit violations, twenty two (22) of which are subject to mandatory minimum penalties in the amount of \$66,000.
6. The Presiding Officer of the Regional Board Hearing Panel issued two pre-hearing orders

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ruling on procedural objections raised by the City (April 29, 2010) and on the equitable defense of laches and due process issues raised by the City (May 13, 2010). The Regional Board adopted the Presiding Officer's April 29 and May 13, 2010 Pre-hearing Orders as final decisions for purposes of this Administrative Civil Liability Order on Complaint No. R4-2008-0058-M and for purposes of any petition filed pursuant to Water Code section 13320. The Regional Board concluded that consistent with direction from the State Water Resources Control Board in Order WQ 2007-0010 (Escondido Creek Conservancy), the equitable doctrine of laches does not apply to mandatory minimum penalties.

7. On May 17, 2010, this matter was heard in Los Angeles, California before a Hearing Panel consisting of Regional Board Members Ms. Madelyn Glickfeld (Presiding Officer), Ms. Francine Diamond, Ms. Jeanette Lombardo, and Mr. Steve Blois. Mr. Michael W. Webb, City Attorney appeared on behalf of the City of Redondo Beach. Mr. Samuel Unger, Mr. Russ Colby, and Ms. Mayumi Okamoto appeared for the Prosecution Team. The Hearing Panel subsequently submitted to the Regional Board its report of the hearing consisting of the findings of fact, conclusions of law, and recommended administrative civil liability, a copy of which is attached hereto and incorporated herein by reference.
8. Based on evidence presented in the hearing, the Hearing Panel determined that there were eighteen (18) effluent limit violations, seventeen (17) of which are subject to mandatory minimum penalties in the amount of \$51,000. Exhibit "A" has been further modified to reflect the Hearing Panel's determination (see Amended Exhibit "A" attached).
9. Upon considering the Hearing Panel report and making an independent review of the record, the Regional Board during its meeting on May 17, 2010 upheld the imposition of the Hearing Panel's proposed administrative civil liability on the Permittee. The Regional Board directed payment of a total assessment of \$51,000 on Complaint No. R4-2008-0058-M.
10. The assessment is due and payable and must be received by the Regional Board no later than thirty days after the date of adoption of this Order on Complaint by the Regional Board.
11. In the event that the Permittee fails to comply with the requirements of this Order, the Executive Officer or designee is authorized to refer this matter to the Office of Attorney General for enforcement.
12. Any person aggrieved by this action of the Regional Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

IT IS HEREBY ORDERED that, pursuant to § 13323 of the CWC, the Permittee shall make a cash payment of \$51,000 (payable to the State Water Pollution Cleanup and Abatement Account) no later than thirty days after the date of issuance of this Order.

In the event that the Permittee fails to comply with the requirements of this Order on Complaint No. R4-2008-0058-M, the Executive Officer is authorized to refer this matter to the Office of Attorney General for enforcement.

I, Samuel Unger, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board on DATE.

Samuel Unger
Interim Executive Officer

Date _____

AMENDED EXHIBIT "A"
 City of Redondo Beach
 Seaside Lagoon
 CI 8034

Date	Monitoring Period	Violation Type	Parameter	Reported Value	Permit Limit	Units	Pollutant Category	% Exceeded	Serious/Chronic	Water Code Section 13385	Penalty
05/23/2003	May-03	Daily Maximum	TRC	1,800	8	µg/L	2	22,400	Serious	(h)(1)	\$3,000
05/23/2003	May-03	Monthly Average	TSS	76	50	mg/L	1	52	Serious	(h)(1)	\$3,000
05/28/2003	May-03	Daily Maximum	TRC	840	8	µg/L	2	10,400	Serious	(h)(1)	\$3,000
05/31/2003	May-03	Monthly Average*	TRC	1,320	2	µg/L	2	65,900	Serious	(h)(1)	\$3,000
06/24/2003	Jun-03	Monthly Average	TSS	64	50	mg/L	1	28	Chronic	(i)(1)	\$3,000
07/10/2003	Jul-03	Monthly Average	TSS	76	50	mg/L	1	52	Serious	(h)(1)	\$3,000
07/22/2003	Jul-03	30-Day Geometric Mean*	Enterococcus	99	24	MPN/100 ml	NA	NA	Chronic	(i)(1)	\$3,000
08/20/2003	Aug-03	Monthly Average	TSS	84	50	mg/L	1	68	Serious	(h)(1)	\$3,000
08/15/2005	Aug-05	Daily Maximum	BOD ₅	75	30	mg/L	1	150	Serious	(h)(1)	\$3,000
08/15/2005	Aug-05	Monthly Average	BOD ₅	75	20	mg/L	1	275	Serious	(h)(1)	\$3,000
09/26/2005	Sep-05	Daily Maximum	TSS	80	75	mg/L	1	7	Chronic	(i)(1)	\$0
10/24/2005	Oct-05	30-Day Rolling Average*	Total Coliform	2,014	1,000	MPN/100 ml	NA	NA	Chronic	(i)(1)	\$3,000
06/05/2006	Jun-06	Daily Maximum	TSS	112	75	mg/L	1	49	Serious	(h)(1)	\$3,000
06/05/2006	Jun-06	Monthly Average	TSS	112	50	mg/L	1	124	Serious	(h)(1)	\$3,000
9/24/2007	Sep-07	Daily Maximum	TRC	710	8	µg/L	2	8,775	Serious	(h)(1)	\$3,000
10/6/2007	Oct-07	Daily Maximum	TRC	2,100	8	µg/L	2	26,150	Serious	(h)(1)	\$3,000
10/6/2007	Oct-07	Monthly Average	TRC	2,100	2	µg/L	2	104,900	Serious	(h)(1)	\$3,000
7/28/2008	Jul-08	Daily Maximum	TRC	2,000	8	µg/L	2	24,900	Serious	(h)(1)	\$3,000
							Total				\$51,000

EXHIBIT “31”

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City of Redondo Beach
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Redondo Beach, CA
90277-0639



Phone: (310) 318-0655
Fax: (310) 372-0167

Attorney for Petitioner CITY
OF REDONDO BEACH

STATE OF CALIFORNIA
REGIONAL WATER RESOURCES CONTROL BOARD
LOS ANGELES REGION

In the Matter of)
)
SETTLEMENT OFFER NO. R4-2008-0058-)
M ISSUED TO CITY OF REDONDO)
BEACH BY CALIFORNIA REGIONAL)
WATER QUALITY BOARD, LOS)
ANGELES REGION, REGARDING)
SEASIDE LAGOON)

I.

INTRODUCTION

City of Redondo Beach (the "City") respectfully petitions the California Regional Water Quality Control Board, Los Angeles Region ("RWQCB") to review the attached Settlement Offer of September 15, 2008 (the "Offer"),¹ issued by Deborah L. Smith, Chief Deputy Executive Officer, RWQCB. City respectfully contends the Offer is based on flawed legal conclusions, data, and calculations. Therefore, City hereby requests RWQCB review the Offer in light of City's arguments raised herein, and further requests RWQCB make findings that the alleged violations noted in the Offer are unsupported, that the alleged violations should be removed from the Offer (to the extent it operates as an NOV), and that the alleged violations should be expunged from the

¹ Though not titled as such, the Offer also appears to be notice of violation ("NOV"), as it states "[t]his letter is to inform City ... of alleged violation of the California Water Code[,]" and the attachment thereto is entitled "Exhibit 'A' - Notice of Violation").

1 California Integrated Water Quality System (“CIWQS”) database.

2 **II.**

3 **RELEVANT FACTS AND PROCEDURAL HISTORY**

4 **A. City’s Operation of Seaside Lagoon**

5 Seaside Lagoon is a salt water recreational facility located just behind King Harbor in
6 Redondo Beach, California. Water for Seaside Lagoon comes from the ocean, taken from a depth
7 of about 50 feet. The water first travels to the nearby AES Redondo Power Plant (“AES”) where
8 AES uses the water to cool the steam-generation turbines. The water then travels underground in
9 large pipes to Seaside Lagoon. Upon reaching Seaside Lagoon, the water is chlorinated. Prior to
10 the water leaving Seaside Lagoon, it is dechlorinated. Seaside Lagoon normally contains
11 approximately 1.5 million gallons of water and has a flow through rate of approximately 200,000
12 gallons per hour.

13 **B. Regulatory Matters Regarding Seaside Lagoon**

14 City has a National Pollution Discharge Elimination System (“NPDES”) Permit (No.
15 CA0064297) addressing water discharge quality and operations at the Seaside Lagoon.
16 Specifically, Seaside Lagoon discharges water into King Harbor, another historic part of City’s
17 waterfront amenities. City applied for and received its NPDES Permit in 1999,² which was
18 subsequently renewed in 2005.³ City’s NPDES Permit expires in 2010. Because City has not
19 been able to comply with the effluent limitations set by RWQCB, even after ongoing and costly
20 attempts to comply, City has embarked upon a project to remodel Seaside Lagoon into a “closed
21 loop” facility (i.e., there will be no water discharged at all) by 2010.

22 Pursuant to the monitoring and reporting program, which is an integral part of City’s
23 NPDES Permit, City performs regular monitoring of the water discharged from Seaside Lagoon
24 into King Harbor. Under the NPDES Permit as revised in 2005,⁴ reports regarding the results of

25 _____
26 ² NPDES Order No. 99-057, attached as Exhibit “1.”

27 ³ NPDES Order No. R4-2005-0016, attached as Exhibit “2”

28 ⁴ See Attachment “T,” Monitoring and Reporting Program No. 8034, attached to Exhibit “2.”

Reporting Period

Report Due

1 the monthly monitoring are provided to RWQCB thirty or forty-five days after the sampling
2 occurs, depending on if the sampling was done during the "season" (basically summer) or not.
3 Monthly reports created by City prior to the 2005 revision were provided to RWQCB in basically
4 the same manner.⁵

5 Since City's NPDES Permit was issued in 1999, RWQCB has alleged City violated the
6 water quality requirements of its NPDES Permit on multiple occasions. On May 4, 2001,
7 RWQCB issued an NOV to City for seventeen violations that allegedly occurred during the years
8 2000 and 2001. All of the alleged violations concerned exceedances of the effluent limitation for
9 residual chlorine.⁶ On March 29, 2002, RWQCB filed an Administrative Civil Liability ("ACL")
10 complaint (the "ACL Complaint") pursuant to California Water Code section 13385(h), seeking
11 \$51,000 in ACL.⁷ City waived a hearing and paid RWQCB \$45,000 in ACL and \$6,000 for
12 RWQCB's Supplemental Environmental Projects ("SEP").

13 After settling the ACL Complaint of March 29, 2002, City continued to provide
14 monitoring reports to RWQCB pursuant to City's NPDES permit. Some of those reports included
15 monitoring results that arguably indicated the presence of certain regulated constituents⁸ above the
16 effluent limitations set by RWQCB, which concerned City. Though RWQCB did not issue any
17 ACL Complaint or other citation regarding the alleged violations in the five years after the ACL
18 Complaint of March 29, 2002, City recognized that there was a problem that needed to be
19

20 Start of Operation – June 30 August 1
21 July 1 – July 31 September 1
22 August 1 – End of Operation October 1
23 Annual Summary Report October 1 of each year[.]
24 Monitoring reports for off-season discharges shall be submitted 45 days after sampling.

24 ⁵ See Exhibit "1" at p. T-1.

25 ⁶ Based on ACL Complaint No. R4-2004-0159 (attached hereto as Exhibit "3"), and the
26 allegations therein, however, it appears the water originating at AES does contain chlorine prior to reaching
27 Seaside Lagoon.

27 ⁷ Complaint No. R4-2002-0014, attached as Exhibit "4."

28 ⁸ Biochemical Oxygen Demand ("BOD"), Total Suspended Solids ("TSS"), Total Residual
Chlorine, pH, and Total Coliform are the constituents which have allegedly been found in levels exceeding
the effluent limitations found in City's permit.

1 addressed.

2 Accordingly, in 2007, City requested a Time Scheduling Order (“TSO”) with interim
3 effluent levels that City could meet, based on data collected in 2006. The purpose of the TSO
4 with the elevated effluent limitations was to allow City enough time to study the cause of the
5 apparent exceedances, and enough time to attempt to resolve any problem found, without
6 penalizing City for what would have been classified as exceedances under the effluent levels in
7 City’s then-current NPDES Permit. RWQCB issued TSO No. R4-2007-0024⁹ in response to
8 City’s request. That TSO provided that, from May 1, 2007, through January 31, 2008, City’s TSS
9 and BOD limitations would be raised as follows: City’s TSS maximum was raised from 75/50
10 (daily/monthly) mg/L to 250/200 mg/L, and City’s BOD maximum was raised from 30/20 mg/L to
11 100/100 mg/L. During this period, City complied with the effluent limitations for TSS and BOD.

12 City studied the matter of its apparent exceedances in detail during 2007, and prepared a
13 detailed report for RWQCB regarding the same.¹⁰ In contrast to the elevated BOD levels detected
14 in 2006, City’s sampling in 2007 failed to indicate problematic BOD concentrations.¹¹ Ergo, the
15 sampling in 2007 did not shed any light on the cause of the elevated BOD data gathered in 2006.

16 TSS, however, was present in sampling conducted in 2007, and City’s report noted the
17 levels of TSS found at Seaside Lagoon during 2007 were generally the same as were present in
18 King Harbor.¹² Based on this fact, the report concluded the “most likely” source of the TSS
19 problems at Seaside Lagoon was influent water (i.e., ocean water) commingling with the water in
20 Seaside Lagoon.¹³ That is, the location at which Seaside Lagoon’s TSS sampling was (and is)
21 being performed did not include just Seaside Lagoon’s effluence (i.e., its discharge, what is
22 regulated under the NPDES Permit), but also influent ocean waters (which had elevated
23 concentrations of TSS). Based on the report’s findings regarding TSS, City requested a second

24
25 ⁹ TSO No. R4-2007-0024, attached as Exhibit “5.”

26 ¹⁰ Source Identification Report, dated October 1, 2007, attached as Exhibit “6.”

27 ¹¹ See *id.* at p. 8, ¶ 1.2.1.

28 ¹² See TSO No. R4-2008-0002, attached as Exhibit “7.”

¹³ See Exhibit “6” at pgs. 5-6, 17-18.

1 TSO regarding TSS. RWQCB granted a second TSO on January 31, 2008, which set the TSS
2 effluent limitation (for February 1, 2008, through February 28, 2010) at 120/60 mg/L.¹⁴ City has
3 not had an exceedance of the TSS effluent limitation since the 120/60 mg/L standard was put in
4 place.

5 City has contemplated simply shutting down Seaside Lagoon many times because of issues
6 related to effluent limitation compliance. Because RWQCB worked with City by granting TSOs
7 as opposed to issuing ACL Complaints, City believed RWQCB was going to work with City to
8 allow Seaside Lagoon to stay open while City made the necessary adjustments (i.e., going to a
9 non-discharging operation). In fact, City relied on RWQCB's failure to address stale effluent
10 limitations concerns; had RWQCB indicated any interest in pursuing apparent violations that were
11 years old, City likely would not have given much consideration to Seaside Lagoon's ongoing
12 existence, and simply shut Seaside Lagoon down permanently.

13 It was with some surprise, then, when City received RWQCB's Offer on September 17,
14 2008.¹⁵ The Offer alleges violations of Water Code Section 13385(h)-(i), which allegedly make
15 City liable for \$147,000 in mandatory penalties.¹⁶ Previously, RWQCB waited slightly less than
16 two years to raise alleged violations in an NOV (the May 4, 2001, NOV addressed alleged
17 violations occurring between July 1999 and August 2000). The formal ACL Complaint that was
18 issued regarding the majority of those violations (it omitted any alleged violation occurring 1999)
19 was issued on March 29, 2002, again less than two years after the first alleged violation at issue
20 therein. As stated in the Offer, many of the alleged violations are over five years old, and no
21 formal action has even been initiated as of the date of this Petition. The Offer basically argues the
22 delay at issue was reasonable because economic factors do not make Seaside Lagoon a priority
23 enforcement target, and that the delay was actually beneficial to City. Regardless of RWQCB's
24 explanation, City is sure the amount it potentially saved by having this matter raised in a severely
25

26 ¹⁴ *Id.*

27 ¹⁵ A copy of the Offer is attached hereto as Exhibit "8."

28 ¹⁶ Any reference herein to subsection (h) or (i) refers to Water Code section 13385 unless
otherwise noted.

1 belated fashion is far outweighed by the expenditures City could have avoided regarding the
2 ongoing operation of Seaside Lagoon but for RWQCB's lethargy. It is upon the forgoing factual
3 basis that City raises its legal and equitable arguments, contending RWQCB should make findings
4 that the violations alleged in the Offer are unsupported, and that RWQCB should therefore vacate
5 the alleged violations (and the implicitly the Offer) and have them expunged from the CIWQS
6 database.

7 **III.**

8 **ARGUMENT**

9 **A. THE DOCTRINE OF LACHES PRECLUDES LIABILITY FOR ALLEGED**
10 **VIOLATIONS OCCURRING MORE THAN THREE YEARS BEFORE FORMAL**
11 **ACTION IS TAKEN**

12 RWQCB's Offer cites to *City of Oakland v. Pub. Employees Ret. Sys.* 95 Cal. App. 4th 29,
13 48 (2002) for the proposition "that there are no statutes of limitations that apply to administrative
14 proceedings to assess mandatory minimum penalties." While *City of Oakland* may stand for the
15 foregoing proposition, it definitely holds that in "some cases of delay, equity may bar an
16 administrative proceeding, and 'the courts will apply notions of laches borrowed from the civil
17 law.'" *Id.* at 51 (citing *Brown v. State Pers. Bd.*, 166 Cal. App. 3d 1151, 1158-59 (1995)). An
18 "administrative agency must diligently pursue the disciplinary action as if it were seeking
19 equitable relief[.]" and RWQCB has failed to do so here. *Brown*, 166 Cal. App. 3d at 1159. The
20 foregoing being true, RWQCB is barred from seeking ACL or other penalties regarding alleged
21 effluent limitation violations unless formal action is taken within a reasonable time. As shown
22 below, a reasonable time is no more than three years.

23 **1. A "Borrowed" Statute of Limitations Can Establish What an Unreasonable**
24 **Delay Is as a Matter of Law Regarding the Application of the Laches Doctrine**

25 "[T]he defense of laches may operate as a bar to a claim by a public administrative agency,
26 ... if the requirements of unreasonable delay and resulting prejudice are met." *Robert F. Kennedy*
27 *Medical Center v. Belshe*, 13 Cal. 4th 748, 760 (1996); accord *Fountain Valley Reg'l Hosp. &*
28 *Med. Ctr. v. Bonta'*, 75 Cal. App. 4th 316, 323 (1999).

[T]he elements of unreasonable delay and resulting prejudice ... may be 'presumed'

1 if there exists a statute of limitations which is sufficiently analogous to the facts of
2 the case, and the period of such statute of limitations has been exceeded by the
3 public administrative agency in making its claim. In [this] situation, the limitations
4 period is ‘borrowed’ from the analogous statute, and the burden of proof shifts to
5 the administrative agency.

6 *Fountain Valley Reg'l Hosp. & Med. Ctr. v. Bonta*, 75 Cal. App. 4th 316, 323-24 (1999).

7 “Whether or not such a borrowing should occur depends upon the strength of the analogy.”

8 *Brown*, 166 Cal. App. 3d at 1160. When the period of delay is longer than the “borrowed” statute
9 of limitations, “unreasonable delay [can] be found as a matter of law.” *Brown*, 166 Cal. App. 3d
10 at 1159.

11 a. **“Borrowing” Code of Civil Procedure Section 338(i) Is Appropriate**

12 Here, there is not only a statute of limitations which is analogous to the facts of the case,
13 there is a statute of limitations that applies to civil actions brought under the *same statute* wherein
14 RWQCB’s authority to seek ACL is found: Water Code section 13385.

15 Code of Civil Procedure section 338(i)¹⁷ states there is a three year limitation on bringing:
16 [a]n action commenced under the Porter-Cologne Water Quality Control Act
17 (Division 7 (commencing with Section 13000) of the Water Code). The cause of
18 action in that case shall not be deemed to have accrued until the discovery by the
19 State Water Resources Control Board or a regional water quality control board of
20 the facts constituting grounds for commencing actions under their jurisdiction.

21 As RWQCB plainly states in the Offer, “[t]he formal enforcement action that the Regional Board
22 uses to assess such liability is an [ACL] complaint, although the Regional Board may instead refer
23 such matters to the Attorney General’s Office.” The authority for the forgoing proposition is
24 located in Water Code section 13385(b)-(c) (part of the Porter-Cologne Water Quality Control
25 Act), a section within the scope of Code of Civil Procedure section 338(i)’s three-year limitations

26 _____
27 ¹⁷ Code of Civil Procedure section 338(a) provides a three-year limitation period for any “action
28 upon liability by statute, other than a penalty or forfeiture[.]” and is thus a more general subsection than
338(i). However, since Water Code section 13385(b) is a statutory basis under which civil actions seeking
liability may be brought, subsection (a), in addition to subsection(b), provides a analogous three-year
limitation period that may be “borrowed” regarding the imposition of ACL.

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period.

The text of subsections (b) (which authorizes the Attorney General to “petition the superior court to impose liability”¹⁸) and (c) (which applies to the imposition of ACL by the state or regional boards) of Water Code section 13385 is basically the same except as to the amount of liability and the party seeking it;¹⁹ the analogy between the two subsections could not be more clear. In fact, it is plainly clear that the two subsections at issue are alternatives for redressing the same violations.²⁰ Because there could be no stronger analogy, the three-year limitation period set

¹⁸ A petition is a form of “action” to which Code of Civil Procedure section 338 applies. See *Howard Jarvis Taxpayers Ass’n v. City of La Habra*, 25 Cal. 4th 809, 821 (2001) (a “petition to enforce a statutory liability must be brought within the same three-year period after accrual of the cause of action [citation] as an action for damages or injunction on the same liability”); *Pacheco v. Clark*, 44 Cal. App. 2d 147, 151 (1941) (indicating section 338 applied to a petition). Thus, when a party “may petition the superior court[.]” it means the party can file an action in the superior court, in the form of a petition. See *In re S.A.*, 6 Cal. App. 3d 241, 244 n.2 (1970) (citing Welfare and Institution Code section 781, which states that when a person petitions the superior court to permit inspection of records, the document used to make that request is a petition).

¹⁹ Water Code section 13385(b)-(c) states:

(b) Civil liability may be imposed by the superior court in an amount not to exceed the sum of both of the following:

(1) Twenty-five thousand dollars (\$25,000) for each day in which the violation occurs.

(2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed twenty-five dollars (\$25) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

The Attorney General, upon request of a regional board or the state board, shall petition the superior court to impose the liability.

(c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

(2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

²⁰ I.e., the subsections at issue provide substantially parallel enforcement mechanisms for violations that fall under Water Code section 13385(a). Water Code section 13385(a)(2) authorizes civil liability for any violation of a “waste discharge requirement[.]” Implicitly, because Water Code section 13385(h)-(i) applies to violations of effluent limitations (which are put forth in the applicable waste discharge requirements), any violation which triggers the applicability of subsections (h) or (i) of Water Code section 13385 must also be a violation that makes subsection (a)(2) applicable.

1 in Code of Civil Procedure section 338(i) may be properly “borrowed.” Thus, a delay can be
2 unreasonable as a matter of law, and prejudice can be presumed, regarding any alleged violations
3 occurring more than three years before RWQCB issued a formal ACL Complaint. Therefore, the
4 burden is on RWQCB to show why its delay was reasonable, assuming it does eventually issue an
5 ACL complaint.

6 **b. RWQCB Cannot Meet Its Burden to Show Its Delay Was Reasonable**
7 **or that the Delay Was Not Prejudicial**

8 Because RWQCB has failed to take formal action regarding certain alleged violations
9 occurring over three years ago (see subsection III.A.2. herein), pursuant to the “borrowing” rule,
10 RWQCB has the burden of proof to show its delay was reasonable *and* without prejudice. “To
11 defeat a finding of laches [an] agency... must ... (1) show that the delay involved in the case ... was
12 excusable, and (2) rebut the presumption that such delay resulted in prejudice to the opposing
13 party.” *Id.* Because RWQCB’s delay was not excusable and did result in prejudice to City (e.g.,
14 tainted business judgments and increased potential liability for NPDES Permit violations),
15 RWQCB will not be able avoid the application of the doctrine of laches.

16 (1) RWQCB’s Delay Was Not Reasonable

17 As noted above, when the period of delay is longer than the “borrowed” statute of
18 limitations, “unreasonable delay [can] be found as a matter of law.” *Brown*, 166 Cal. App. 3d at
19 1159. Here, because of the undeniable strength of the analogy between RWQCB’s impending
20 ACL Complaint and the three-year statute of limitation provided in Code of Civil Procedure
21 section 338(i), any reasonable court would find RWQCB’s delay was unreasonable as a matter of
22 law.

23 Regardless, RWQCB’s delay was also unreasonable as a matter of fact. The Offer states:
24 “Regional Board staff’s limited enforcement resources and competing enforcement priorities
25 provide a rational explanation for the delay. In fact, the delay has actually benefitted [City]
26 because it extended the time before payment of the mandatory minimum penalties is due. For
27 these reasons, any delay is not unreasonable.” City must disagree with RWQCB’s conclusion
28 stated in the prior excerpt because: 1) the statement fails to present a sufficient basis to excuse

1 delay, and 2) the statement does not appear to be factually accurate.

2 (a) The Regular Press of Business Alone Does Not Justify an
3 Unreasonable Delay

4 The alleged violations herein are based on certain of City's monitoring reports that indicate
5 effluent level exceedances have occurred at Seaside Lagoon. City generally mails copies of its
6 monitoring reports within either thirty or forty-five days after sampling (upon which the report is
7 based) occurs (that is, on or before the date due under the NPDES Permit). Though City admits it
8 is not aware of RWQCB's specific protocols and requirements related to preparing an ACL
9 complaint (or other formal action) regarding alleged NPDES violations, City is informed that
10 basically all of the "evidence" used in ACL complaints (or the like) is the information found in the
11 monitoring reports, which are provided to RWQCB within less than two months of sampling.

12 For example, RWQCB's ACL Complaint No. R4-2002-0014 (Exhibit "4"), which alleges
13 violations of the Water Code, is based solely on City's self-monitoring reports. Other than
14 contacting City's service provider regarding an apparent clerical error (certain reports used the
15 term "combined chlorine" where the data represented "total residual chlorine"), it appears no
16 investigation was done in preparation for issuing the ACL Complaint. Furthermore, the ACL
17 Complaint is only six pages long, much of which appears to be "boilerplate" when compared to
18 other ACL complaints recently issued by RWQCB.²¹ Thus, it appears the preparation and
19 issuance of an ACL complaint requires minimal investigation, little (if any) analysis, and only a
20 small amount of document drafting.

21 In fact, the simplicity of NPDES violation enforcement is by design. The NPDES self-
22 monitoring system is intended "to keep enforcement actions simple and speedy: [¶] '[o]ne purpose
23 of the [monitoring] requirements is to avoid the necessity of lengthy fact finding, investigations,
24 and negotiations at the time of enforcement. Enforcement of violations ... should be based on
25 relatively narrow fact situations requiring a minimum of discretionary decision making or delay.'" *See City of Brentwood v. Cent. Valley Reg'l Water Control Bd.*, 123 Cal. App. 4th 714, 723 (2004)

27
28 ²¹ See, e.g., http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/enforcement/acl_docs/R4-2008-0036.pdf (ACL complaint for mandatory minimums under subsections (h) and (i)).

1 improperly putting "spoil piles" (soil and other material that resulted from the excavation portion
2 of a construction project) into a stream bed.²⁴ RWQCB staff inspected the location where the
3 spoil piles were on at least three occasions by March 21, 2008, and it appears the cause of the
4 alleged violations had been completely addressed by March 10, 2008 (by removing the spoil piles
5 from the stream bed).²⁵ The Malibu ACL Complaint also states that the alleged violations
6 regarding the placement of the spoil piles could result in ACL of up to \$225,000.²⁶ After a
7 thorough explanation of how equitable factors applied regarding the City of Malibu's alleged
8 violations, the Malibu ACL Complaint states the total recommended penalty is \$52,375.²⁷

9 The Malibu ACL Complaint shows three things. First, it shows RWQCB can act quickly
10 regarding alleged violations with a relatively low "dollar value."²⁸ Second, it shows RWQCB can
11 do multiple site investigations, review applicable law, and apportion liability (based on a complex
12 multiple-factor analysis), in less than eight months. Third, it shows that RWQCB does not appear
13 to prioritize enforcement actions based on the likelihood of repeat offenses (as the City of
14 Malibu's issue appears to be a singular situation).

15 City is well aware RWQCB has many matters before it, and that the Malibu ACL
16 Complaint is not necessarily representative of each of those matters, or even a composite thereof.
17 What it does indicate, however, is the RWQCB was able to formally address a violation, which
18 required factual investigation and analysis (as to both the application of the law and the equitable
19 factors to the facts), in less than eight months. Here, the alleged conduct at issue is basically laid
20 out in reports RWQCB probably had within forty-five days of any alleged violation occurring.
21 And yet, RWQCB has not taken any formal action at all, even after three years (or more in some
22

23 ²⁴ *Id.* at p. 1-2.

24 ²⁵ *Id.* at p. 2-3.

25 ²⁶ *Id.* at p. 3-4.

26 ²⁷ *Id.* at p. 6.

27 ²⁸ Compare the Malibu ACL Complaint (with a \$225,000 maximum ACL) to the September 5,
28 2008, ACL complaint issued regarding 345 alleged violations (with a total *mandatory minimum* of
\$945,000) at Six Flags Magic Mountain (an amusement park), available at
http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/enforcement/acl_docs/R4-2008-0036.pdf.

1 instances). Thus, when the progression of the two matters (City of Malibu and Seaside Lagoon)
2 are compared, and taking into account the relative complexity and potential for future violations
3 regarding each matter, there appears to be no basis that would justify RWQCB now taking action
4 regarding alleged violations that took place (and RWQCB became aware of) more than three years
5 ago.

6 2. RWQCB's Delay Was Prejudicial

7 As mentioned herein, City has debated closing Seaside Lagoon because of the problems
8 related to NPDES Permit compliance. Because RWQCB continued to work with City regarding
9 TSOs, and because RWQCB did not take any formal action within a reasonable amount of time
10 (i.e., three years) regarding the earliest alleged violations (that is, those in 2003), City was induced
11 to make further expenditures regarding studies done and reports prepared concerning the water
12 discharge issues related to Seaside Lagoon. Furthermore, RWQCB's inaction was in part
13 responsible for City's decision to not only keep Seaside Lagoon open until 2010 (when its NPDES
14 Permit expires), but to remodel Seaside Lagoon (to a non-discharging facility) so it would remain
15 open seasonally without interruption. Because City made vast, non-refundable expenditures based
16 on RWQCB's failure to act in a timely fashion, the delay at issue was plainly prejudicial.

17 Furthermore, had RWQCB taken action regarding the 2003 violations in a timely manner
18 (e.g., issued an ACL complaint by October 1, 2006), City would have been put "on notice" that
19 ACL could be a continuing cost of operating Seaside Lagoon, and City could have made the
20 business judgement to close it down. Had City closed Seaside Lagoon on October 1, 2006, no
21 further alleged violations would have occurred after that date. Based on the Offer, City could have
22 avoided \$30,000 of mandatory minimum penalties RWQCB alleges City is now liable for.
23 Accordingly, RWQCB's delay was instrumental in City expending money it might not have but
24 for RWQCB's inaction, and that inaction also lead to allegations of \$30,000 in mandatory
25 minimum penalties City could have avoided if RWQCB had been more assiduous in this matter.²⁹
26 RWQCB's delay was plainly prejudicial, making it impossible for RWQCB to overcome its
27

28 ²⁹ The \$30,000 of ACL City is now allegedly liable for regarding violations supposedly occurring
after October 1, 2006, is also discussed in the context of equitable estoppel, in section III.B. herein.

1 burden on this issue.

2 **2. The Three-year Laches Period Can Only Be Calculated Once RWQCB Takes**
3 **Formal Action**

4 As RWQCB is aware, no ACL complaint has been issued regarding the alleged violations
5 of 2003 through 2007. The only action RWQCB has taken regarding the alleged violations
6 mentioned in the previous sentence has been to make a settlement offer (i.e., the Offer), which is
7 nothing more than negotiation. The text of the Offer indicates the Offer is not a formal action: “[if
8 City accepts the Offer] The Regional Board will accept that payment in settlement of any
9 enforcement action that would otherwise arise out of the violations identified in the NOV.”
10 Because the Offer is just an element of an attempt at negotiation, and not a formal action, it does
11 nothing to toll the “borrowed” statute of limitations. *See 65 Butterfield v. Chicago Title Ins. Co.*,
12 70 Cal. App. 4th 1047, 1063 (1999) (negotiation does not toll a limitation period).

13 Accordingly, because the applicable laches period is the same as the three-year period
14 provided for in Code of Civil Procedure section 338(i), RWQCB must first take some kind of
15 formal action (e.g., the issuance of an ACL complaint), Before it can be determined what alleged
16 violations RWQCB is barred from proceeding on. For example, if RWQCB issued an ACL
17 complaint on October 15, 2008 (the date the Offer expires), RWQCB would be precluded from
18 enforcing alleged violations RWQCB was aware of as of October 15, 2005. Thus, if as of October
19 15, 2005, RWQCB had City’s reports regarding self-monitoring performed prior to October 1,
20 2005, then, as of October 15, 2008, all sixteen alleged violations occurring prior to October 1,
21 2005 (for which \$48,000 of penalties are sought), are now beyond RWQCB’s reach by operation
22 of the three-year laches period. That is, even if RWQCB files an ACL complaint on October 15,
23 2008, that ACL complaint can only address alleged violations RWQCB became aware of on or
24 after October 15, 2005.

25 Based on the foregoing, RWQCB should make findings that the alleged violations noted in
26 the Offer occurring prior to October 15, 2005, are unsupported, hold that the Offer (NOV) is
27 vacated as to those alleged violations, and further hold that those alleged violations shall be
28 expunged from the CIWQS database.

1 **B. THE DOCTRINE OF EQUITABLE ESTOPPEL PRECLUDES RWQCB FROM**
2 **ASSESSING PENALTIES FOR ALLEGED VIOLATIONS OCCURRING AFTER**
3 **OCTOBER 1, 2006**

4 “[E]quitable estoppel forbids a party to show existence of a fact when by his past conduct
5 it would work an injustice to his adversary to permit him to do so[.]” *Lockyer v. Sun Pac.*
Farming Co., 77 Cal. App. 4th 619, 642 (2000) (citation omitted).

6 [F]our elements must be present in order to apply the doctrine of equitable
7 estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must
8 intend that his conduct shall be acted upon, or must so act that the party asserting
9 the estoppel had a right to believe it was so intended; (3) the other party must be
10 ignorant of the true state of facts; and (4) he must rely upon the conduct to his
11 injury.

12 *Long Beach v. Mansell*, 3 Cal. 3d 462, 488 (1970) (citation omitted); *see* Evid. Code § 623
13 (“[w]henever a party has, by his own statement or conduct, intentionally and deliberately led
14 another to believe a particular thing true and to act upon such belief, he is not, in any litigation
15 arising out of such statement or conduct, permitted to contradict it”).

16 Additionally, “[e]stoppel against the government requires an additional finding not
17 required against a private party[. The court must find:] (1) estopping the [agency] would not
18 nullify a strong rule of policy adopted for the public's benefit and (2) the injustice to the [party
19 seeking estoppel] without estoppel outweighs, and therefore justifies, any effect upon public
20 interest or policy that results from estopping” the agency. *See Feduniak v. California Coastal*
21 *Com.*, 148 Cal. App. 4th 1346, 1372 (2007) (citing *Mansell*). As the name implies, equitable
22 estoppel is a matter to be determined by a court sitting in equity. *See Salton Cmty. Servs. Dist. v.*
23 *Southard*, 256 Cal. App. 2d 526, 534 (1967) (“[a]lthough a governmental agency may not be
24 estopped by the conduct of its officers or employees in every instance, where justice and right
25 require it the doctrine will be applied”).³⁰

26
27 ³⁰ Estoppel has previously been applied successfully against governmental agencies. *See Wilson v.*
28 *City of Laguna Beach*, 6 Cal.App.4th 543 (1992) (city of Laguna Beach was estopped from enforcing its
second-dwelling unit ordinance because the city did not administer the state law for second-dwelling units
correctly in the first place); *Hock Inv. Co. v. City and County of San Francisco*, 215 Cal. App. 3rd 438
(1989) (holding reliance by a property owner on an administrative regulation of the City and County of San

1 Here, all four elements, plus the additional requirements for estopping a governmental
2 agency, are present. Thought each element is addressed individually below, City's estoppel
3 argument is basically as follows: City made certain judgments (i.e., the continued operation of
4 Seaside Lagoon) based in part on RWQCB's failure to raise the issue of potential ACL penalties
5 in a timely fashion. Accordingly, because City reasonably relied on RWQCB's inaction to City's
6 detriment (that is, City kept Seaside Lagoon open), RWQCB should now be estopped from
7 obtaining ACL for alleged violations City could have avoid if RWQCB acted in a timely manner.

8 As to the first element , the *City of Oakland* case cited by RWQCB in the Offer plainly
9 outlines how a "borrowed" statute of limitations may apply to administrative action (though there
10 may be no actual statute of limitations), so it would be disingenuous for RWQCB to claim
11 ignorance of the concept. Similarly, as the Water Code and statutes related thereto are RWQCB's
12 milieu, it is doubtful RWQCB is unaware of Code of Civil Procedure section 338(i) (which
13 explicitly mentions it applies to Division seven of the Water Code).

14 Regarding the second element, RWQCB's failure to timely bring ACL is something more
15 than simple inaction. RWQCB knew that the imposition of ACL could have a very significant
16 impact on how, and if, City operated Seaside Lagoon. RWQCB's failure to act provided City with
17 a false understanding of RWQCB's intentions, and RWQCB did nothing to correct that false
18 understanding. For example, City might not have requested a TSO be issued in 2007 (which
19 would require City to perform costly analysis and produce a report), had City known RWQCB had
20 a backlog of ACL it was intending to impose upon City. Similarly, City would have definitively
21 thought twice before embarking on a project to remodel Seaside Lagoon had it known it would
22 presented be with the Offer. Surely equity requires that RWQCB at least mention to City the
23 impending ACL each time City informed RWQCB of City's actions and intentions (many of them
24 costly) regarding the operation of Seaside Lagoon. Thus, City had a right to rely on RWQCB's
25 inaction as a foundation for the business judgments it made.

26 As to the third element, City simply did not know RWQCB intended on issuing the Offer
27 (or ACL) for alleged violations over five years old in some cases. For example, RWQCB issued a
28

Francisco was a valid basis for an estoppel against the City in enforcing a later-enacted ordinance).

1 renewed NPDES Permit for Seaside Lagoon in 2005 (Exhibit “2”), and mentioned therein that a
2 violation of the enterococcus effluent level “may have”³¹ occurred in 2003. RWQCB did not
3 mention that ACL would be sought. What it did show is that regarding a previous alleged
4 violation, a NOV was issued within two years. There was no reason for City to know RWQCB
5 intended to seek many years after the fact. Indeed, the laches period has run for many of the
6 alleged incidents noted in the Offer.

7 As is required under the fourth element, City has clearly relied on RWQCB’s inaction to
8 its detriment. Not only has City engaged in studies, reports, and modifications that quite possibly
9 would have been forgone had RWQCB timely acted, City is now potentially liable for, as the
10 Offer states, \$30,000 of ACL (i.e., amount of mandatory penalties that correlate with the ten most
11 recent alleged violations listed in the Offer). RWQCB’s failure to timely act influenced the
12 decisions City made regarding the continued viability of Seaside Lagoon. Ergo, City detrimentally
13 relied on RWQCB’s silence; RWQCB should have indicated its intention to seek ACL regarding
14 alleged violations happening years prior when RWQCB became aware of City’s intention to invest
15 into Seaside Lagoon’s continued operation.

16 Finally, the concerns related to equitably estopping a governmental entity are not present
17 here. City is not questioning RWQCB’s ability to regulate discharges in the waters of the state.
18 City’s only challenge is to RWQCB’s attempt to impose liability based on stale allegations of
19 effluent limitation violations. Attempts to impose ACL beyond the applicable laches period is
20 certainly not a “strong rule of public policy adopted for the public’s benefit[.]” and thus, City’s
21 interest in estopping RWQCB here must outweigh RWQCB’s interest in belated code
22 enforcement. *See Feduniak*, 148 Cal. App. 4th at 1372. Because City can meet all of the
23 requirements for estopping RWQCB’s improper attempt to impose ACL regarding the alleged
24 violations occurring after October 1, 2006 (totaling penalties of \$30,000), City requests RWQCB
25 make findings that those particular alleged violations are unsupported, hold that the Offer (NOV)
26

27 ³¹ NPDES permit violations are mainly based on self-monitoring reports. Because RWQCB was
28 likely in possession of such reports regarding June 2003 within a month thereof, there is no evidence
suggesting RWQCB had not determined an enterococcus violation had occurred in 2003 as of March 3,
2005 (the date of the renewed NPDES Permit).

1 is vacated as to those alleged violations, and further hold that those alleged violations shall be
2 expunged from the CIWQS database.

3 **C. CERTAIN PENALTIES NOTED IN THE OFFER ARE IMPROPER “DOUBLE**
4 **PENALTIES” PER THE STATE WATER RESOURCES BOARD**

5 In a legal memoranda dated December 6, 1999, (the “Memo”) the State Water Resources
6 Control Board (“SWRCB”) explained how SB 709 would change the Water Code by amending,
7 among other portions of the code, section 13385.³² SB 709 is responsible for subsections (h) and
8 (i) being added to Water Code section 13385. And though the relevant subsections have been
9 amended since the Memo was written, it is still applicable to the interpretation and enforcement of
10 section 13385.

11 The Memo is written, in part, in question and answer format. One question therein is: “In
12 determining the number of violation for the purpose of [Water Code] section 13385(h) or (i)
13 should the State or Regional Board count one violation for each separate limitation regardless of
14 the number of violations?” The Answer states: “A violation that fits into more than one category
15 should *not* be assessed a double penalty. For example, a serious violation could also be a violation
16 of an effluent limitation, but *penalties should not be assessed twice for the same violation.*”³³
17 (Italics added).

18 Exhibit “A” attached to the Offer shows RWQCB is seeking two penalties for the same
19 violation, contrary to the SWRCB’s interpretation of the applicable statute. For example, between
20 June 5, 2006 (the date of the first alleged violation in 2006), and July 24, 2006, RWQCB indicates
21 four violations of the TSS effluent limitation occurred.³⁴ The first two alleged violations
22 supposedly were serious violations (i.e., violations of subsection (h)), while the third and fourth
23 were determined to be “chronic violations” (i.e., violations of subsection (i)) by RWQCB. Exhibit
24 “A” states a \$3,000 penalty is applicable for each of the first two alleged violations (under
25

26 ³² The Memo is attached as Exhibit “9.”

27 ³³ The question (No. 15) and answer are located on page 13 of the Memo.

28 ³⁴ The alleged violations at issued are supposed to have occurred June 5 (TSS Daily Maximum),
June 5 (TSS Monthly Average), July 18 (TSS Daily Maximum), and July 24 (Daily Maximum), 2006.

1 subsection (h)), that no penalty is applicable to the third alleged violation (i.e., it is the third
2 chronic violation, for which there is no penalty under subsection (i)), and that there is a \$3,000
3 penalty for the fourth alleged violation (under subsection (i)).

4 Because there were no alleged violations in the six months proceeding the four mentioned
5 above, RWQCB is clearly counting the first two alleged violations (the serious violations) as two
6 of the predicate violations required to reach the four-violation threshold of subsection (i).

7 SWRCB has stated in no uncertain terms that “penalties should not be assessed for the same
8 violation twice.” By counting serious violations as predicate violations under subsection (i),
9 RWQCB is engaging in prohibited double penalization.

10 If it was acceptable for RWQCB to assess chronic penalties based on serious violations
11 (for which a penalty had been assessed), then RWQCB could assess mandatory penalties for four
12 serious violations that happen within six months of each other, and a fifth mandatory penalty
13 because the fourth violation ran afoul of subsection (i)(1)(a). RWQCB has not done this in
14 practice, however. For example, four alleged serious violation (for which mandatory minimums
15 are allegedly proper) are supposed to have occurred at Seaside Lagoon between May 23, and May
16 31 2003. and yet, Exhibit “A” (where the alleged violations are explained) does not indicate a
17 fifth penalty being assessed under subsection (i)). The reason such penalty is not alleged is clear;
18 it would be an impermissible double penalty.

19 When an alleged violation is assessed a mandatory penalty under subsection (h) and is also
20 considered a predicate violation under subsection (i), that is a double penalty, plain and simple.
21 SWRCB has made it clear that double penalization is improper under section 13385(h)-(i).
22 Accordingly, RWQCB is bound to follow SWRCB’s interpretation of the mandatory minimums
23 requirements at issue, and RWQCB should find that the double penalties stated in the Offer
24 (totaling \$21,000) are unsupported, hold that the Offer (NOV) is vacated as to those alleged
25 violations, and further hold that those alleged violations (i.e., those that are the basis for a second
26 penalty) shall be expunged from the CIWQS database.

27
28

1 **E. THE DAILY EFFLUENT LIMITATION FOR TSS WAS IMPROPERLY SET IN**
2 **2005**

3 As noted in the “Fact Sheet”³⁵ created regarding City’s application to renew Seaside
4 Lagoon’s NPDES Permit in 2005 (and confirmed in Exhibit “A”), the applicable daily effluent
5 limitation for TSS was 150 mg/L under Seaside Lagoon’s original permit. The Fact Sheet, which
6 include’s RWQCB’s tentative determinations, shows RWQCB intended to set the daily TSS
7 effluent limitation in Seaside Lagoon’s renewed NPDES Permit based solely on the existing
8 permit limitation.³⁶ For reasons that are unclear, however, the 2005 NPDES Permit sets the daily
9 TSS effluent limitation at 75 mg/L, one-half the level it should have been set at pursuant to the
10 original permit.

11 Based on a review of Exhibit “A,” there were eight instances in 2006 when the 75 mg/L
12 daily limitation for TSS appears to have been exceeded, none of which would have been an
13 exceedance had the proper 150 mg/L limitation been in place. That is, during 2006, there were
14 eight TSS samples that indicated a TSS level of more than 75 mg/L but less than 150 mg/L. It is
15 unfair for RWQCB to seek mandatory penalties pursuant to a limitation if the one basis for that
16 particular limitation’s adoption is patently not true (i.e., the level adopted was simply not the same
17 as was stated in the prior permit).

18 If an effluent limitation is set in an arbitrary manner, it is subject to being invalidated. *See*
19 *Indus. Liasion Comm. of Niagra Falls Chamber of Commerce v. Flacke*, 125 Misc. 2d 641, 648
20 (N.Y. 1984). RWQCB’s appears to have acted arbitrarily here, as RWQCB provided no basis for
21 its selection of the 75 mg/L limitation, and because RWQCB stated in 2005 that it intended to
22 base the TSS effluent limitation in the renewed permit on the previously adopted limitation (i.e.,
23 150 mg/L). There is just no evidence supporting RWQCB’s decision to impose the 75mg/L daily
24 effluent limitation for TSS. It is City’s position that RWQCB may only enforce the 150 mg/L
25 effluent limitation as to daily TSS monitoring done pursuant to the renewed NPDES Permit (and
26

27
28 ³⁵ The Fact Sheet is attached hereto as Exhibit “10.”

³⁶ See Exhibit “10” at pgs. F-13 to f-14.

1 not subject to a higher level as stated in a TSO).³⁷ Therefore, as to the eight alleged TSS effluent
2 limitation violations at issue (and the corollary \$24,000 in penalties), RWQCB should find those
3 alleged violations are not supported, hold that the Offer (NOV) is vacated as to those alleged
4 violations, and further hold that those alleged violations shall be expunged from the CIWQS
5 database.³⁸

6 **E. CITY'S ALLEGED TSS EFFLUENT LIMITATION VIOLATIONS SHOULD BE**
7 **WAIVED BECAUSE THE ANALYTICAL METHOD USED RE: TSS IS FAULTY**

8 Approximately one-third of the violations alleged in the Offer are for violations of the TSS
9 effluent limitation. As the TSO's issued regarding Seaside Lagoon indicate, City has consistently
10 attempted to address TSS discharges at Seaside Lagoon, with only partial success. It is likely that
11 Seaside Lagoon is accepting influent water from King Harbor (which has elevated TSS levels),
12 which has a direct impact on what goes back out to King Harbor from Seaside Lagoon. Because
13 of the ongoing TSS compliance issues, City performed research to determine if any other NPDES
14 permittee in a similar situation (i.e., alleged TSS effluent limitation violations where the receiving
15 water is salt water). That research indicated that the TSS method being used regarding Seaside
16 Lagoon compliance monitoring (EPA Test Method 160.2), though approved by RWQCB, is faulty
17 and unreliable.³⁹

18 The California Regional Water Quality Control Board, San Francisco Bay Region ("SF
19 RWQCB"), had occasion to evaluate the accuracy of an analytical method used for testing TSS
20 when reviewing the actions of a permittee operating a sand collection & washing operation.
21

22 ³⁷ This being the case, City is not challenging alleged violations like that of August 7, 2006 (a TSS
23 level above 150 mg/L was reported), as to the improperly set effluent limitation. Regardless, the alleged
24 violations like that of August 7 may still be violations, but only *if* the reporting was accurate. *See also*
Section III.D. herein (explaining how TSS sampling is unreliable).

25 ³⁸ Accordingly, the TSO issued on January 31, 2008 should provide a daily TSS effluent of 150
26 mg/L, not 120 mg/L, as the TSO provides. Because the TSO issued April 26, 2008, sets the daily TSS level
at 250 mg/L, it is not effected by the revision of the permit-stated TSS level.

27 ³⁹ In fact, other research has cast doubt the use of the TSS analytical method in general for
28 measuring the mass of solid-phase material in natural water, suggesting the suspended sediments
concentrations method produces more reliable data. *See Comparability of Suspended-Sediment
Concentration and Total Suspended Solids Data*, by John R. Gray, et al., United States Department of the
Interior (August 2000) (attached as Exhibit "11").

1 Specifically, SF RWQCB stated:

2 On the issue of TSS, the Discharger has provided evidence to show that the analytical
3 method for TSS is not reliable for saline samples, because salinity interferes with the
4 results. Studies submitted to support this conclusion are titled “*Evaluation of the Accuracy*
5 *of and Reliability of EPA Test Method 160.2 to Measure Total Suspended Solids in*
6 *Effluent from Marine Sand Processing Facilities, June 1, 2005*,”⁴⁰ and two addendums
7 dated June 16, 2005 and March 24, 2006, respectively. Based on this evidence, the
8 Regional Water Board finds that it is appropriate to waive monitoring for compliance with
9 the TSS limits in the General Permit for Discharger’s facilities, and other facilities that
10 process sand from the saline environments in this reason.⁴¹

11 SF RWQCB further stated that it was “the Regional Water Board’s intent to revisit and
12 establish appropriate TSS requirements for marine and sand washing facilities[.]” The import of
13 this is simple: because the TSS testing method used regarding Seaside Lagoon is EPA Test
14 Method 160.2 is unreliable, it cannot be the evidence upon which a violation of an NPDES Permit
15 is based.

16 Self-monitoring reports have been referred to as “admissions” in the context of effluent
17 limitation violations (see *City of Brentwood*, 123 Cal. App. 4th at 725). Regardless, it is clear that
18 RWQCB has the burden of proof regarding alleged violations of effluent limitations. See *State of*
19 *California v. City and County of San Francisco*, 94 Cal. App. 3d 522, 546 (1977) (noting that
20 once a plaintiff proves a discharge in violation of the Water Code, it is the defendant’s burden to
21 show why the maximum penalty is not applicable). And though it is true that self-monitoring
22 reports are often the key evidence relied on in proving effluent limitation violations, a report
23 indicating a violation occurred is not, per se, a violation of the either subsection (h) or (i). See
24 Water Code § 13385(h)-(i) (penalty only applicable based on violation(s), not simply the reporting
25 information that would seem to indicate a violation occurred). It must be remembered that even

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27 ⁴⁰ The report mentioned in the text is available upon request.

28 ⁴¹ See Order No. R2-2006-0038, issued by SF RWQCB, available at
www.waterboards.ca.gov/sanfranciscobay/board_info/agendas/2006/june/06-14-06-5dfinalto.doc.

1 though self-monitoring greatly reduces the investigatory burden on RWQCB, determining if an
2 effluent limitation violation is not ministerial task, but a matter of “discretionary decision
3 making.” *See City of Brentwood*, 123 Cal. App. 4th at 723.

4 The unreliability of the TSS test method at issue accordingly makes any reported data
5 regarding TSS measurements (as noted in City’s self-monitoring reports) unreliable as well.
6 Through no fault of City’s, RWQCB has no reliable evidence upon which to find City liable for
7 violating the TSS effluent limitation found in Seaside Lagoon’s NPDES Permit. Accordingly,
8 RWQCB should find that all penalties stated in the Offer regarding alleged violations of the TSS
9 effluent limitation (totaling \$54,000) are not supported and should be both vacated from the Offer
10 (NOV) and be expunged from the CIWQS database.

11 **F. AES’ DISCHARGE NEEDS TO BE EVALUATED TO DETERMINE IF IT IS THE**
12 **CAUSE OF SOME OF THE ALLEGED VIOLATIONS**

13 One issue that remains unclear is how AES’ discharge (i.e., water which feeds into Seaside
14 Lagoon and also drains into the ocean), effects Seaside Lagoon’s water quality. AES’ discharge
15 travels through a system of pipes until it reaches one of two outfalls in the ocean. A small portion
16 of AES’ discharge is re-routed from that system of pipes into Seaside Lagoon. Because AES’
17 discharge may be unfairly tainting Seaside Lagoon, City believes the discharge from AES may be
18 in part responsible for any TSS effluent limitation violations alleged against City.

19 As Exhibit “3” shows, AES has no effluent limitation regarding its outfall discharge.⁴²
20 There are, however, effluent limitations for suspended solids regarding the “Inplant Waste
21 Stream.” These limitations are 30 mg/L (monthly) and 100 mg/L (daily).⁴³ The fact that
22 suspended solids are regulated at the AES facility indicates there is the possibility that TSS should
23 be addressed regarding AES’ external discharge as well. Thus, it is possible that TSS present in
24 AES’ discharge would not be violative of AES’ NPDES permit, even though it would violate
25 Seaside Lagoon’s.

26 Therefore, City requests RWQCB recognize the apparent disconnect between the effluent
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28 ⁴² *See* Exhibit “3” at pgs. 10-12.

⁴³ *Id.* at p. 13.

1 limitation on AES and Seaside Lagoon, and hold the alleged violations of Seaside Lagoon's TSS
2 level should be vacated, and that the CIWQS database be amended accordingly. If RWQCB
3 decides it will not vacate the applicable alleged violations of the TSS effluent limitation as stated
4 in the Offer, City then requests RWQCB consider AES' discharge (being without an effluent
5 limitation for TSS as to outfall discharge) as a mitigating measure, to be considered regarding any
6 penalties or liability sought.

7 **G. THE INTRODUCTION OF TSS LEVELS LOWER THAN PRESENT IN THE**
8 **RECEIVING WATERS IS PLAINLY INEQUITABLE**

9 "[A] fundamental purpose of the [federal Clean Water] Act⁴⁴ was to shift pollution
10 control from a focus on receiving water quality to a focus on the technological control of effluent."
11 *Crown Simpson Pulp Co. v. Costle*, 642 F.2d 323, 327 (9th Cir. 1981). Furthermore, it has been
12 held that a "lower concentration of [pollutant] per liter of water added to a higher concentration of
13 that same pollutant] per liter of water will not contribute to an impairment in the receiving water.
14 See *Alabama Dep't of Env'tl. Mgmt. v. Alabama Rivers Allian.*, Case Nos. 2050995 and 2050974,
15 2007 Ala. Civ. App. LEXIS 798 (Dec. 28, 2007).

16 In the City's report of October 1, 2007, it was determined that, among several sampling
17 locations in and around Seaside Lagoon, the samples take from King Harbor actually had the
18 highest average TSS concentration.⁴⁵ And based on City's review of the Seaside Lagoon facility,
19 City has determined that it is likely backflow⁴⁶ from King Harbor (entering Seaside Lagoon via
20 both Seaside Lagoon's own outfall and AES' outfall pipe from which Seaside Lagoon draws
21 water) is raising the level of TSS in Seaside Lagoon. As mentioned above, control of effluence is
22 the goal of the regulations at issue. City should not be penalized because the sampling protocol it
23 has agreed to reflects the TSS level present in the harbor water, which at times may be higher than
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25 ⁴⁴ The State of California has been delegated authority to implement the NPDES program (the key
26 element of the federal Clean Water Act) for California's water. See Water Code §§ 13370-13389.

27 ⁴⁵ See Exhibit "6" at p. 17, ¶ 12.4.3.

28 ⁴⁶ TSS is also likely leaching into Seaside Lagoon through the soil, thus creating the same influent
problem as does backflow.

1 the TSS limitation in Seaside Lagoon's NPDES Permit.

2 Therefore, City requests the inherent inequity of the current sampling system be recognized
3 by RWQCB, that any alleged violations of Seaside Lagoon's TSS level should be vacated, and
4 that the CIWQS database be amended accordingly. If RWQCB decides it will not vacate the
5 applicable alleged violations of the TSS effluent limitation as stated in the Offer, City the requests
6 RWQCB consider the issue of backflow as a mitigating measure, to be considered regarding any
7 penalties or liability sought.

8 **H. RWQCB SHOULD CONSIDER THE FACTORS LISTED IN WATER CODE**
9 **SECTION 13327 BEFORE ISSUING ANY ACL FOR THE ALLEGED**
10 **VIOLATIONS NOTED IN THE OFFER**

11 In determining the amount of civil liability, the regional board ... shall take into
12 consideration the nature, circumstance, extent, and gravity of the violation or
13 violations, whether the discharge is susceptible to cleanup or abatement, the degree
14 of toxicity of the discharge, and, with respect to the violator, the ability to pay, the
15 effect on ability to continue in business, any voluntary cleanup efforts undertaken,
16 any prior history of violations, the degree of culpability, economic benefit or
17 savings, if any, resulting from the violation, and other matters as justice may
18 require.

19 Water Code § 13327. Though RWQCB contends the penalties noted in the Offer are mandatory,
20 City contends the determination of whether or not a violation occurred (as opposed to the proper
21 penalty or liability for that violation) is within the discretion RWQCB possesses. Thus, it is
22 proper for RWQCB to give consideration to the equitable factors as outlined below.

23 **1. Nature, Circumstances, Extent, and Gravity of the Alleged Violations**

24 The cause of the alleged violations is not fully known. The problem appears to be
25 seasonal, and no direct harm to any person, business, or natural resource has occurred. The fact
26 Seaside Lagoon has operated a facility for water recreation without any reported cases of sickness
27 or other injury tends to prove the alleged violations are of a minor character. Furthermore, many
28 of the violations alleged in the Offer appear to have been only slightly over the applicable

1 “serious” limitation. In sum, this factor weighs in favor of leniency.

2 **2. Susceptibility of the Cleanup or Abatement of the Discharge**

3 Because the alleged discharges were minor and had no major lasting effect, this factor
4 weighs in favor of reducing or eliminating any proposed ACL.

5 **3. Degree of Toxicity of the Discharge**

6 The main constituent that appears to have been problematic regarding effluent limitations
7 at Seaside Lagoon was TSS. Because it appears King Harbor likely has TSS levels as high or
8 higher than Seaside Lagoon, the discharge of TSS into King Harbor likely does not raise the TSS
9 level present in King Harbor.

10 Furthermore, Seaside Lagoon’s potential discharge is classified in Category “3,” which
11 includes “[t]hose discharges of waste which could degrade water quality without violating water
12 qualify objectives, or cause a minor impairment of designated beneficial uses compared with
13 Category I and Category II.” This classification shows that Seaside Lagoon’s discharge is likely
14 to be, relatively speaking, not very toxic, if at all. Accordingly, this factor cuts against ACL being
15 issued.

16 **4. Ability of the Permittee to Pay**

17 Though City may be able to pay ACL, the money would come out of municipal funds.
18 Thus, City should not be considered in the same class as large businesses where the imposition of
19 ACL would simply cut into profits. Thus, this factor does not weigh for or against the imposition
20 of ACL.

21 **5. Effect on the Permittee’s Ability to Continue Its Business**

22 Had City been timely apprised of RWQCB’s intention to issue ACL years after alleged
23 violations occurred, City may have closed Seaside Lagoon. One of the key reasons City did not
24 shut down Seaside Lagoon was that it appeared RWQCB was going to work with City so the
25 problems at Seaside Lagoon could be fixed. Regardless, because of the problems City has
26 encountered regarding effluent limitation violations at Seaside Lagoon, City has determined it will
27 modify Seaside Lagoon into a non-discharging operation in the near future. Had City operated
28 Seaside Lagoon as a private company, it is doubtful it would have had the funds to both remodel

1 Seaside Lagoon and pay ACL. Accordingly, City believes this factor weighs against the
2 imposition of ACL.

3 **6. Any Voluntary Cleanup efforts Undertaken**

4 Because the alleged violations are minor, there was no need for cleanup. Additionally,
5 City has now determined it is going to prevent discharges altogether by converting Seaside Lagoon
6 into a non-discharging facility. Thus, to the extent this factor is applicable, it weighs in favor of
7 leniency.

8 **7. Prior History of Violations**

9 Though one ACL complaint has been issued regarding Seaside Lagoon, City paid the ACL
10 at issue and has taken steps to address RWQCB's concerns. Accordingly, this factor does not
11 weigh in favor of either the issuance or non-issuance of ACL.

12 **8. Degree of Culpability**

13 As is stated throughout this document, there are many potential causes for the alleged
14 violations. None of those causes, however, are related to intentional acts of the City. Ergo, this
15 factor supports RWQCB not issuing ACL.

16 **9. Economic Benefit or Savings**

17 City has enjoyed no pecuniary benefit of the alleged violations, and has only incurred
18 expenses attempting to keep Seaside Lagoon open to the public. This factor plainly cuts in favor
19 of not issuing ACL.

20 **10. Other Matters as Justice May Require**

21 As discussed herein, City reasonably believed RWQCB was working with City to get
22 Seaside Lagoon "back on track." City had no way of knowing RWQCB was planning to
23 accumulate fifty-nine alleged violations spanning five years before RWQCB even made definitive
24 mention of an intention to seek ACL therefor. As a matter of equity, justice requires no ACL be
25 issued for stale alleged violations City could have avoided had RWQCB timely addressed the
26 alleged violations. Furthermore, because the allegations are based on self-monitoring reports,
27 there was little investigation or analysis required, meaning RWQCB's enforcement costs related to
28 Seaside Lagoon are minimal. In sum, this factor weighs heavily in favor of RWQCB not issuing

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ACL.

On balance, the factors overwhelmingly favor not issuing ACL at all. Thus, to the extent RWQCB has any discretion regarding the imposition of any particular liability or penalty, the equities clearly weigh in favor of leniency.

IV.

CONCLUSION

City fully recognizes and appreciates RWQCB's role in protecting the waters of the United States, and that RWQCB is bound by certain procedures and statutory mandates it must follow. As outlined above, however, City has provided a thorough legal defense for thirty-five of the forty-nine alleged violations of Water Code section 13385.⁴⁷ Furthermore, based on the apparent problems related to sampling protocol, backflow issues, and source water contamination, it is questionable if the remaining fourteen alleged violations are appropriately directed at City.

Therefore, City respectfully requests RWQCB: 1) find the thirty-five violations specifically addressed herein are not supported, 2) withdraw the Offer as to those alleged violations (and vacate the NOV element of the Offer accordingly), 3) expunge those alleged violations from the CIWQS database, and 4) refrain from seeking liability, ACL or otherwise, regarding the other fourteen alleged violations, until the cause of those alleged violations can be properly investigated.⁴⁸

Dated: October 15, 2008


Michael W. Webb,
Attorney for Petitioner

⁴⁷ See Section IIIA-D herein.

⁴⁸ City would agree to any applicable laches period or statute of limitations being tolled for a reasonable period of time while such investigation occurred as to the fourteen alleged violations mentioned above.

EXHIBIT “32”



California Regional Water Quality Control Board

Los Angeles Region



Recipient of the 2001 *Environmental Leadership Award* from Keep California Beautiful

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Agency Secretary

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Arnold Schwarzenegger
Governor

September 29, 2009

Mr. Michael W. Webb
City Attorney
City of Redondo Beach
415 Diamond Street
Redondo Beach, CA 90277-0639

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. 7008 1830 0004 3360 5194

RESPONSE TO REQUEST FOR ALLEGED VIOLATION REVIEW – CITY OF REDONDO BEACH, SEASIDE LAGOON, 200 PORTFINO WAY, REDONDO BEACH, CA (ORDER NOS. 99-057 AND R4-2005-0016, NPDES PERMIT NO. CA0064297, CI NO. 8034)

Dear Mr. Webb:

Thank you for your letter received on October 17, 2008, responding to the September 15, 2008 Settlement Offer No. R4-2008-0058-M (Settlement Offer), which assessed mandatory minimum penalties (MMPs) for violations of effluent limitations. This letter addresses your comments in this regard.

Argument A:

"The doctrine of laches precludes liability for alleged violations occurring more than three years before formal action is taken".

Staff Response:

While we rely on *City of Oakland* to reach the conclusion that a three-year statute of limitations is inapplicable to administrative proceedings, we also recognize that *City of Oakland* discussed a separate defense of laches. (*City of Oakland v. Public Employees Retirement System* (2002) 95 Cal.App.4th 29, 51.)

Under appropriate circumstances, the defense of laches may operate as a bar to a claim by a public administrative agency, if the requirements of unreasonable delay and resulting prejudice are met. (*Fountain Valley Regional Hospital & Medical Center v. Bonta* (1999) 75 Cal.App.4th 316, 323.) The elements of unreasonable delay and resulting prejudice may be met in two ways. (*Ibid.*) First, they may be demonstrated by the evidence in the case and the party arguing in favor of applying laches has the burden of proof on the laches issue. (*Id.* at 324.) Second, the element of prejudice may be presumed if there exists a statute of limitations which is sufficiently analogous to the facts of the case and the period of such statute of limitations has been exceeded by the public administrative agency making the claim. (*Ibid.*) In this situation, there is no statute of limitations that directly applies, however, there exists a statute of limitations governing an analogous action at law which may be borrowed as the outer limit of reasonable delay for the purpose of laches. (*Id.*; *Brown v. State Personnel Bd.* 166 Cal.App.3d at 1160.) Recognition of an analogous statute of limitations shifts the burden of proof from the party asserting laches to the party arguing against application of the doctrine of laches. (*Fountain Valley Regional Hospital & Medical Center*, at 325.)

California Environmental Protection Agency



Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.

The City asserts the second method to establish the elements of unreasonable delay and resulting prejudice. As discussed in the section above, there is no statute of limitations that directly applies to the administrative actions. Assuming that California Code of Civil Procedure section 338(i) was the statute of limitations that could be borrowed for purposes of laches causing the burden of proof to shift to the Regional Board, the Regional Board has presented facts excusing its delay in issuing MMPs and rebutted the presumption that the City has been prejudiced by this delay.

The Regional Board staff's limited enforcement resources and competing enforcement priorities provide a rational explanation for the delay in issuing MMPs against the City. Approximately 270 facilities within the Regional Boards' jurisdiction have received similar letters including the Offer to Participate in Expedited Payment Program. The sheer number of facilities within the jurisdiction of the Regional Board and the limited number of staff managing enforcement provide a reasonable justification for the delay in issuing MMPs.

Furthermore, the City has not been substantially prejudiced by the passage of time between the date(s) that it reported the violations identified in Exhibit A and the date of the Offer to Participate in Expedited Payment Program. In fact, the delay has actually benefited the City because it extended the time before payment of the mandatory penalties is due to the Regional Board. Furthermore, the violations were immediately known to the City since they were reported as part of a self-monitoring program and the City was aware or should have been aware of the statutory provisions that set MMPs for the noted violations. Thus, the Regional Board has sufficiently rebutted the presumption that the City experienced prejudice in the delay of the administrative proceeding.

Where there is no showing of manifest injustice to the party asserting laches, and where application of the doctrine would nullify a policy adopted for the public protection, laches may not be raised against a governmental agency. (*Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 628-629.) The Legislature intended the mandatory penalty scheme in Water Code section 13385 to ensure "swift and timely enforcement of waste discharge requirements [to] assist in bringing the state's waters into compliance and [] ensure that violators do not realize economic benefits from noncompliance." (Stats. 1999, ch. 92, § 2, subd. (d) [Assem. Bill No. 1104]; ch. 93, § 2, subd. (d) [Sen. Bill 709]; see also *City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 724-725 [discussing legislative intent].) Pollution of water is a per se public nuisance. (E.g., *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 381.) The mandatory penalty scheme therefore serves the purpose of public protection by deterring water pollution and depriving dischargers of the economic benefits of violations. Barring the imposition of MMPs via laches would defeat these public protection goals. Laches therefore is an inapplicable defense to MMPs under Water Code section 13385.

Furthermore, the City asserts that California Code of Civil Procedure section 338(i) provides a three-year statute of limitations for actions brought under the California Water Code. Section 338(i) states that an "action" under the Porter-Cologne Water Quality Control Act must be filed within three years after discovery by the State or Regional Water Quality Control Board.

While it seems applicable on its face, section 338(i) does not control the applicable statute of limitations period in administrative proceedings. Similar to other statutes of limitation adopted by the Legislature in the Code of Civil Procedure (beginning with section 312), section 338(i) applies only to "actions." An "action" is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment

of a public offense. (Code Civ. Proc., § 22.) Accordingly, the statutes of limitation in the Code of Civil Procedure apply to cases filed in court, not administrative proceedings before the State Water Board or Regional Board. (See *City of Oakland* at 95 Cal.App.4th 29, 48; *Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal.App.4th 1357, 1361-1362; *Little Company of Mary Hospital v. Belshe* (1997) 53 Cal.App.4th 325, 329; *Bernd v. Eu* (1979) 100 Cal.App.3d 511, 515; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 405(2), p. 510.)

Argument B:

"The Doctrine of equitable estoppel precludes RWQCB from assessing penalties for alleged violations occurring after October 1, 2006".

Staff Response:

Generally speaking, four elements must be demonstrated by clear and convincing evidence in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of the facts; and (4) he must rely upon the conduct to his injury. (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305 [citation omitted]) An additional step is required when the doctrine of equitable estoppel is asserted against the government. Policy concerns must be weighed balancing the injustice that would result from a failure to uphold an assertion of estoppel against the effect of the estoppel on the public interest. (*Smith v. County of Santa Barbara* (1992) 7 Cal.App.4th 770, 776 [citation omitted]). Estoppel will not apply against the government if "the result will be the frustration of a strong public policy." (*Bib'le v. Committee of Bar Examiners* (1980) 26 Cal.3d 548, 553.) Public policy must be considered where a party raises estoppel to prevent enforcement of environmental statutes. (See *People, ex rel. State Air Resources Bd. v. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1347.)

Estoppel will apply to the government when the four elements above are met *and* estoppel will apply when "the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy that would result from the raising of an estoppel." (*Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497.) Where even one of the requisite elements for estoppel is missing, estoppel will not apply. (*In re Marriage of Brinkman* (2003) 111 Cal.App.4th 1281, 1289.)

In the October 17, 2008 letter, the City argues that the doctrine of equitable estoppel precludes the Regional Water Board from assessing penalties for alleged violations occurring after October 1, 2006 because it made "certain judgments based in part on [the] RWQCB's failure to raise the issue of potential ACL penalties in a timely fashion. Accordingly, because the City relied on [the] RWQCB's inaction to the City's detriment, [the] RWQCB should be estopped from obtaining ACL for alleged violation the City could have avoid[ed] in a timely manner." The cut-off date of October 1, 2006 arguably constitutes the statute of limitations period. As such, the Regional Water Board has previously responded to this argument above. The mere failure to enforce the law, without more, will not estop the government from subsequently enforcing it. (*Feduniak v. California Coastal Commission* (2007) 148 Cal.App.4th 1346, 1369.) On their face the City's arguments are flawed and as demonstrated below are without merit.

Presently, the City cannot demonstrate that all of the requisite elements are present to estop the Regional Water Board from imposing MMPs. Particularly, the City cannot show the second element demonstrating the Regional Water Board's intent and the City's reasonable reliance. In its response, the City argues that the Regional Water Board's failure to act provided the City with a false understanding of the Regional Water Board's intentions and that the Regional Water Board did nothing to correct that

false understanding. Furthermore, the City argues that it had the right to rely on the Regional Water Board's inaction as a foundation for the business judgments it made with respect to the Seaside Lagoon.

In order to prevail on this element, the City must demonstrate that the Regional Water Board intended for the City to take some action based on its regulatory inaction or that it was reasonable for the City to believe that the Regional Water Board so intended. (*Feduniak* at 148 Cal. App. 4th 1367.) There is no evidence that the Regional Water Board intended for the City to take some action related to the Seaside Lagoon based upon its regulatory inaction in bringing enforcement against the effluent limitation violations. Additionally, there is no evidence indicating that the Regional Water Board assented to the violations or that the Regional Water Board's inaction equates to inferred acquiescence. The court in *Feduniak* states that it is purely speculative to infer that inaction signals regulatory acceptance. (*Ibid.*)

Even if the City inferred acquiescence from the Regional Water Board's inaction in enforcing the violations, it was unreasonable for the City to rely on that inaction and claim that it made certain business judgments based on that inaction. The unreasonableness of the City's reliance is particularly true in light of the fact that the Regional Water Board is mandated by Water Code section 13385 subdivisions (h) and (i) to enforce these violations and assess MMPs. It is unreasonable of the City to believe that Regional Water Board inaction or delay indicates that there would be no enforcement of those past violations particularly when the statutory scheme mandates such enforcement.

Even assuming that the City demonstrates all of the elements of equitable estoppel, it cannot be applied to actions of a government agency when doing so would effectively nullify a strong rule of public policy adopted for the benefit of the public. (*Id.*, at 1372.) As previously discussed above, the Legislature adopted the MMP provisions of Water Code section 13385 to bring the state's waters into compliance with effluent limitations and ensures that violators do not realize economic benefits from noncompliance. The mandatory penalty scheme therefore serves the purpose of public protection by deterring water pollution and depriving dischargers of the economic benefits of violations. Barring the imposition of MMPs via equitable estoppel would nullify these public protection goals. Therefore, equitable estoppel cannot be asserted against the Regional Water Board.

Argument C:

"Certain penalties noted in the offer are improper "double penalties" per the State Water Resources Control Board".

Staff Response:

Regional Board staff cited the effluent limit violations in accordance with CWC sections 13385 (h) and (i) and the State Water Resources Board's April 17, 2001 guidance document titled *SB 709 and SB 2165 Questions and Answers*. The City's argument is based on a memoranda dated December 6, 1999, and not on the most current document noted above. The current answer to Question 38 states "... a violation that fits into more than one subdivision of [California Water Code] section 13385 should not be assessed a double penalty. For example, a serious violation under section 13385(h) would also be an exceedance of an effluent limitation under section 13385(i)(1), but penalties should not be assessed twice for the same violation. If the discharger had exceeded four effluent limitations in a period of six consecutive months, and the first and fourth violations were serious violations, the discharger would be assessed a mandatory minimum penalty of \$6,000, not \$9,000. The second serious violation is also the first violation subject to a mandatory minimum penalty under section 13385(i)(1), but the discharger would only be assessed once for that violation." The fact that the two June 5, 2006 effluent limit exceedances [classified as "serious" pursuant to CWC 13385 (h)], were used as "predicate violations" has no relevance to the City's "double

penalties" argument. The Regional Board, where appropriate as provided by CWC sections 13385 (h) and (i), only assessed a mandatory minimum penalty of \$3,000 once to each separate exceedance of an effluent limitation.

Argument [D]:

"The daily effluent limitation for TSS was improperly set in 2005".

Staff Response:

On March 5, 2005, the Regional Board adopted Order No. R4-2005-0016 which served as a permit under the National Pollutant Discharge Eliminations System (NPDES Permit No. 0064297) and prescribed waste discharge requirements for the Permittee's discharge. Included in Order No. R4-2005-0016 were effluent limitations for total suspended solids (TSS). Furthermore, Order No. R4-2005-0016 was approved by both the Regional Board and the Permittee and withstood a proper review period. It was the City's burden to file a timely petition with the State Water Resources Control Board (State Board) when the Order was issued. The City is barred from raising objections to the permit now. Therefore, the violations for TSS as noted in Exhibit "A", remain.

Argument E:

"City's alleged TSS effluent limitation violations should be waived because the analytical method used re: TSS is faulty".

Staff Response:

As noted in the City's response, the California Regional Water Quality Control Board, San Francisco Bay Region (Region 2) relied upon a technical report titled *Evaluation of the Accuracy of and Reliability of EPA Test Method 160.2 to Measure Total Suspended Solids (TSS) in Effluent from Marine Sand Processing Facilities* (technical report) to waive monitoring of TSS for compliance with effluent limitations. Regional Board staff disagree with this argument. The technical report's conclusion stated the following, "The results of the experiments indicate that the EPA Method 160.2 test is neither accurate nor precise for measuring suspended fine mineral sediment ("silt") as TSS in **effluent from marine sand processing facilities** – and certainly cannot be relied on to measure compliance with permit discharge limits" (emphasis added). This conclusion is based on analyses of a specific type of effluent, marine sand processing. Due to the fact the City's effluent is not from the processing of marine sand, the technical report's conclusion does not apply. Furthermore, EPA Test Method 160.2 addresses the issue of interferences from saline waters with the following, "Samples high in Filterable Residue (dissolved solids), such as saline waters, brines and some wastes, may be subject to a positive interference. Care must be taken in selecting the filtering apparatus so that washing of the filter and any dissolved solids in the filter (7.5) minimizes this potential interference." The City has not provided evidence that the laboratory failed to follow the protocol outlined in EPA Test Method 160.2 to account for interferences. Therefore, the twenty-one (21) TSS effluent limit violations cited in the September 15, 2008 Settlement Offer No. R4-2008-0058-M Notice of Violation attached as Exhibit "A" remain.

Argument F:

"AES' discharge needs to be evaluated to determine if it is the cause of some of the alleged violations".

Staff Response:

Order Nos. 99-057 and R4-2005-0016 were issued by the Regional Board to the City of Redondo Beach. The City is solely responsible for maintaining compliance with the effluent limitations contained therein.

Mr. Michael W. Webb
City of Redondo Beach

- 6 -

September 29, 2009

Argument G:

"The introduction of TSS levels lower than present in the receiving waters is plainly inequitable"

Staff Response:

The City is requesting "that any alleged violations of Seaside Lagoon's TSS level should be vacated..." Board Order Nos. 99-057 and R4-2005-0016 do not contain intake credit provisions. The Permittee's request for the removal of the twenty-one (21) TSS effluent limit violations has no merit. Therefore, twenty-one (21) TSS effluent limit violations cited in the September 15, 2008 Settlement Offer No. R4-2008-0058-M Notice of Violation attached as Exhibit "A" remain.

Argument H:

"RWQCB should consider the factors listed in Water Code Section 13327 before issuing any ACL for the alleged violations noted in the offer".

Staff Response:

A consideration of the factors listed in Water Code Section 13327 is not required when assessing mandatory minimum penalties under Water Code Section 13385 subdivisions (h) and (i). The amount of administrative civil liability under these subdivisions is prescribed by statute. A consideration of these factors would be done where the Regional Water Board assessed additional discretionary penalties under Water Code Section 13385 subdivision (c) above what is statutorily mandated under Water Code Section 13385 subdivisions (h) and (i).

You are hereby notified that, based on your submittal received by the Regional Board on November 17, 2008, the fifty-four (54) effluent limit violations cited in the October 17, 2008 Settlement Offer No. R4-2008-0058-M Notice of Violation (NOV) attached as Exhibit "A" remain.

Since the City requested review of these violations, the Regional Board has established new deadlines. If you intend to participate in the Expedited Payment Program, you must sign and return the previously sent Acceptance of Conditional Resolution and Waiver of Right to Hearing form by **October 29, 2009**. By signing the Acceptance and Waiver, City of Redondo Beach agrees to pay the penalty of \$147,000 as indicated in Exhibit "A" – Notice of Violation and waives the right to a hearing.

If you do not elect to sign the Acceptance and Waiver, you will be contacted regarding formal enforcement action that will be initiated with regard to the contested violations.

Thank you for your assistance in this matter. Should you have any questions, please contact Mr. Hugh Marley at (213) 620-6375 or Mr. Russ Colby at (213) 620-6373.

Sincerely,


Samuel Unger, P.E.
Assistant Executive Officer

Enclosures: Exhibit "A" – Notice of Violation

cc: Mayumi Okamoto, Office of Enforcement, State Water Resources Control Board

California Environmental Protection Agency



Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.

City of Redondo Beach
Seaside Lagoon
CI 8034

Date	Monitoring Period	Violation Type	Parameter	Reported Value	Permit Limit	Units	Pollutant Category	% Exceeded	Serious/Chronic	Water Code Section 13385	Penalty
06/20/2002	Jun-02	30-Day Average	Enterococcus	156	24	MPN/100 ml	NA	NA	Chronic	(f)(1)	\$0
05/23/2003	May-03	Daily Maximum	Total Residual Chlorine	1,800	8	µg/L	2	22,400	Serious	(b)(1)	\$3,000
05/23/2003	May-03	Monthly Average	TSS	76	50	mg/L	1	52	Serious	(h)(1)	\$3,000
05/28/2003	May-03	Daily Maximum	Total Residual Chlorine	840	8	µg/L	2	10,400	Serious	(h)(1)	\$3,000
05/31/2003	May-03	Monthly Average	Total Residual Chlorine	840	2	µg/L	2	41,900	Serious	(b)(1)	\$3,000
06/03/2003	Jun-03	Daily Maximum	Total Residual Chlorine	140	8	µg/L	2	1,650	Serious	(b)(1)	\$3,000
06/24/2003	Jun-03	Monthly Average	TSS	64	50	mg/L	1	28	Chronic	(f)(1)	\$3,000
06/30/2003	Jun-03	30-Day Average*	Enterococcus	38	24	MPN/100 ml	NA	NA	Chronic	(f)(1)	\$3,000
07/10/2003	Jul-03	Monthly Average	TSS	76	50	mg/L	1	52	Serious	(h)(1)	\$3,000
07/29/2003	Jul-03	30-Day Average*	Enterococcus	35	24	MPN/100 ml	NA	NA	Chronic	(f)(1)	\$3,000
08/20/2003	Aug-03	Monthly Average	TSS	84	50	mg/L	1	68	Serious	(b)(1)	\$3,000
08/27/2003	Aug-03	30-Day Average*	Enterococcus	26	24	MPN/100 ml	NA	NA	Chronic	(f)(1)	\$3,000
08/17/2004	Aug-04	Daily Maximum	TSS	188	150	mg/L	1	25	Chronic	(f)(1)	\$0
08/17/2004	Aug-04	Monthly Average	TSS	188	50	mg/L	1	276	Serious	(h)(1)	\$3,000
08/17/2004	Aug-04	Monthly Average	BOD ₅ 20°C	23.6	20	mg/L	1	18	Chronic	(f)(1)	\$0
09/01/2004	Sep-04	Daily Maximum	BOD ₅ 20°C	525	30	mg/L	1	1,650	Serious	(h)(1)	\$3,000
09/01/2004	Sep-04	Monthly Average	BOD ₅ 20°C	525	20	mg/L	1	2,525	Serious	(h)(1)	\$3,000
09/15/2005	Aug-05	Daily Maximum	BOD ₅ 20°C	75	30	mg/L	1	150	Serious	(b)(1)	\$3,000
09/15/2005	Aug-05	Monthly Average	BOD ₅ 20°C	75	20	mg/L	1	275	Serious	(b)(1)	\$3,000
09/26/2005	Sep-05	Daily Maximum	TSS	80	75	mg/L	1	7	Chronic	(f)(1)	\$0
10/03/2005	Oct-05	Daily Maximum	BOD ₅ 20°C	40	30	mg/L	1	33	Chronic	(f)(1)	\$3,000
10/03/2005	Oct-05	Instantaneous	pH	5.95	6.5 - 8.5	pH Units	NA	NA	Chronic	(f)(1)	\$3,000
10/03/2005	Oct-05	30-Day Rolling Average*	Total Coliform	1,646	1,000	MPN/100 ml	NA	NA	Chronic	(f)(1)	\$3,000
10/10/2005	Oct-05	30-Day Rolling Average*	Total Coliform	2,190	1,000	MPN/100 ml	NA	NA	Chronic	(f)(1)	\$3,000
10/17/2005	Oct-05	30-Day Rolling Average*	Total Coliform	2,005	1,000	MPN/100 ml	NA	NA	Chronic	(f)(1)	\$3,000
10/24/2005	Oct-05	30-Day Rolling Average*	Total Coliform	2,164	1,000	MPN/100 ml	NA	NA	Chronic	(f)(1)	\$3,000
10/31/2005	Oct-05	30-Day Rolling Average*	Total Coliform	1,430	1,000	MPN/100 ml	NA	NA	Chronic	(f)(1)	\$3,000

EXHIBIT “33”



California Regional Water Quality Control Board Los Angeles Region



Linda S. Adams
Agency Secretary

Recipient of the 2001 *Environmental Leadership Award* from Keep California Beautiful

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640 - Internet Address: <http://www.waterboards.ca.gov/losangeles>

Arnold Schwarzenegger
Governor

February 16, 2010

Mr. Robert Brager
Public Works Director
City of Malibu
23815 Stuart Ranch Road
Malibu, CA 90265

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
CLAIM No. 7005 0390 0000 4138 9755

**REVISED COMPLAINT NO. R4-2008-0041-R FOR ADMINISTRATIVE CIVIL LIABILITY
FOR THE CITY OF MALIBU, SOLSTICE CANYON CREEK BRIDGE REPLACEMENT
PROJECT, 26023.5 PACIFIC COAST HIGHWAY, MALIBU, CA.**

Dear Mr. Brager:

Enclosed is Revised Complaint No. R4-2008-0041-R for Administrative Civil Liability in the amount of \$30,015 against the City of Malibu for violation of waste discharge requirements contained in Order No. 2003-0017-DWQ and Water Code section 13376. Also enclosed is a copy of the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) Notice of Public Hearing to Consider Administrative Civil Liability Complaint for this matter.

Unless waived, a hearing before the Regional Board or a Regional Board Hearing Panel (Hearing Panel) will be held on this Complaint pursuant to California Water Code §§ 13228.14 and 13323. Should the Permittee choose to waive its right to a hearing, an authorized agent must sign the waiver form attached to Revised Complaint No. R4-2008-0041-R and return it to the Regional Board by 5:00 pm on March 18, 2010. If we do not receive the waiver and full payment of the mandatory minimum penalty by March 18, 2010, this matter will be heard before the Regional Board or Hearing Panel. An agenda containing the date, time, and location of the hearing will be mailed to you prior to the hearing date.

If you have questions regarding this matter, please contact Mr. Hugh Marley at (213) 620-6375 or Ms. Mercedes Merino at (213) 620-6369.

Sincerely,

Samuel Unger, P.E.
Assistant Executive Officer

cc: Jeff Ogata, Office of Chief Counsel, State Water Resources Control Board
Tracy Egoscue, Los Angeles Regional Water Quality Control Board
Michael Levy, Office of Chief Counsel, State Water Resources Control Board

California Environmental Protection Agency



Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.

Mr. Robert Brager
City of Malibu

- 2 -

February 16, 2010

Bill Orme, State Water Resources Control Board, Division of Water Quality
Neil Manji, Chief, Fisheries Branch, California Department of Fish and Game
Kenneth Wong, U.S. Army Corps of Engineers, Regulatory Branch, Los Angeles District
Jamie Jackson, California Department of Fish and Game, South Coast Region-Region Five
Tom Ford, Santa Monica Baykeeper
Mark Gold, Heal the Bay

California Environmental Protection Agency



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Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION**

In the matter of:)	Complaint No. R4-2008-0041-R
)	Administrative Civil Liability
City of Malibu's Solstice Creek and Corral Canyon Road Bridge Replacement Project)	Pursuant to California Water Code §13350(a)(2) and §13385(c)(1)
26023.5 Pacific Coast Highway)	For Violations of
Malibu, CA)	Order No. 2003-0017-DWQ and California Water Code §13376

THE CITY OF MALIBU IS HEREBY GIVEN NOTICE THAT:

1. The City of Malibu (Permittee) built the Solstice Canyon Creek Bridge Replacement Project (Project), located on Corral Canyon Road at 26023.5 Pacific Coast Highway in Malibu, California. Solstice Canyon Creek flows from north to south under Corral Canyon Road via a box culvert with a reinforced concrete bottom. The Project consisted of removing the existing box culvert under Corral Canyon Road, replacing it with a 28-foot long by 58-foot-wide clear span bridge over Solstice Canyon Creek, and grading about 300 feet of the stream channel. The culvert is located approximately 0.25 miles upstream of the Pacific Ocean.
2. Based on the Regional Water Quality Control Board (Regional Board) staff's inspection of the Permittee's Solstice Creek and Corral Canyon Road Bridge Replacement Project (Site) on January 25, 2008, erosion control and drainage practices employed during the construction activities at the Site were inadequate and resulted in illegal discharges to waters of the State and waters of the United States for which the Regional Board may impose administrative civil liability under section 13350 and 13385 of the California Water Code (CWC).
3. On August 25, 2008, the Regional Board Chief Deputy Executive Officer (Chief Deputy Executive Officer) issued Complaint No. R4-2008-0041 in the amount of \$52,375 for the above-described violations.
4. After further investigation and discussion with the Permittee, the Regional Board Assistant Executive Officer (Assistant Executive Officer) hereby issues Revised Complaint No. R4-2008-0041-R (Revised Complaint) in the amount of \$30,015. This Revised Complaint supersedes Complaint No. R4-2008-0041, which is hereby rescinded.

BACKGROUND

5. On June 14, 2005, in response to the Department of Fish and Game (DF&G) 401 Water Quality Certification Application (401 Application) the State Water Resources Control Board issued Order No. 2003-0017-DWQ, pursuant to CWC section 13260, for Conditional Water Quality Certification (401 Water Quality Certification) to DF&G for one hundred and eleven restoration

February 16, 2010

projects funded by DF&G grants, including the Project at Solstice Canyon Creek. The purpose of the restoration projects is to improve watershed conditions for anadromous fish.

6. On September 6, 2006, the Permittee made applications to various local, state and federal agencies to construct the Corral Canyon Road Bridge Project. The Permittee proposed removing the existing box culvert under Corral Canyon Road and replacing it with a 28-foot long by 58-foot-wide clear span bridge over Solstice Creek.
7. On December 14, 2006, DF&G issued Streambed Alteration Agreement Number 1600-2006-0361-R5 to Ms. Shelah Riggs, consultant for the City of Malibu, for the Solstice Creek Project.
8. On May 25, 2007, the United States Army Corps of Engineers determined that the project as described was subject to its jurisdiction under Section 404 of the Clean Water Act due to the temporary impact of approximately 0.14 acres of waters of the United States, including wetlands, as a result of replacing the Corral Canyon Bridge over Solstice Creek in Malibu, California.
9. The City of Malibu received permission from the United States Army Corps of Engineers (Corps) to install a diversion in the channel on May 15, 2007 across the entire width of the channel. The diversion was constructed along the entire 260 foot width of the channel, on both the north side and the south side of the proposed Solstice Canyon Creek Bridge Replacement Project in early Fall 2007. The Permittee pumped the stream around the diversion/construction project and discharged it downstream of the diversion structures. The Solstice Canyon Creek bridge replacement project was completed in the Fall of 2008.
10. The "Other Actions/Best Management Practices" section of DF&G's 401 Application to the State Water Resources Control Board states that project work within the wetted stream "shall be limited to the period between July 1 and November 1, or the first significant fall rainfall." Enclosure 1, the Project Information Fact Sheet, of the State Board's 401 Water Quality Certification stipulates that the identified Best Management Practices must be followed.

FACTUAL ASSERTIONS

11. On January 25, 2008, after a rain event, Regional Board staff received complaints from the public regarding discharges of soil from spoils piles from the excavation of bridge footers to the creek. Regional Board staff conducted an inspection of the Site on January 25, 2008 and observed spoils piles located on the stream bank and in the creek bed. The rain event had led to erosion and discharge of significant portions of the spoils piles into waters of the State and United States.
12. During the January 25, 2008 inspection, Regional Board staff also noted that there was active erosion along the unprotected stream banks and slopes throughout the Solstice Creek Bridge Replacement Project site (Site).
13. Improper placement of spoils piles and fill material in Solstice Canyon Creek resulted in major discharge of sediment into Solstice Canyon Creek during the January 22, 2008 and January 25, 2008 storm events when the diversion failed.
14. Erosion control and drainage practices employed during the construction activities at this Site proved to be inadequate and resulted in discharges to waters of the State and United States. The Permittee failed to implement the requirements prescribed in their 401 Water Quality Certification.

15. On March 10, 2008, Regional Board staff contacted Mr. Granville Bowman, City of Malibu, to inform the City of the violations. Mr. Bowman stated that the City was aware of the spoils piles being stock piled in the creek and that some of the material had washed downstream.
16. On March 11, 2008, Mr. Richard Calvin, City of Malibu, contacted Regional Board staff to inform the Regional Board that the spoils piles had been removed from the creek.
17. The creation of conditions of pollution or nuisance in any waterbody and its subsequent discharge in violation of waste discharge requirements are violations of CWC sections 13350, 13376 and 13385. The discharges were not solely a result of natural phenomena of an exceptional, inevitable, and irresistible character and could have been prevented or avoided by the exercise of due care or foresight (i.e. compliance with stated Best Management Practices).

SOURCES OF INFORMATION

18. The facts set forth above were obtained from the following sources:
 - a. Regional Board staff inspection on January 25, 2008.
 - b. Regional Board staff inspection report and photographs taken January 25, 2008.
 - c. Regional Board staff inspection on March 6, 2008 and photographs taken that day.
 - d. Regional Board Record of Communication dated March 10, 2008.
 - e. Regional Board Record of Communication dated March 11, 2008.
 - f. Regional Board staff inspection on March 21, 2008.

COUNT I

19. The Regional Board realleges paragraphs 1 through 18.

IMPACTS TO THE WATERS OF THE STATE

20. As set forth in the factual assertions above, the Permittee and/or its contractors, agents, and employees improperly placed spoils piles and fill material in Solstice Canyon Creek, a water of the State, which resulted in major discharge of sediments into Solstice Canyon Creek during the January 22, 2008 and January 25, 2008 storm events.
21. The placement of the spoil piles and fill material in Solstice Canyon Creek was the first discharge to waters of the State because even when a stream is temporarily diverted, the streambed, itself, has not moved. The vegetation and soil structure of the streambed remain despite the diversion. The second discharge occurred when the storm event further discharged the sediments into Solstice Canyon Creek.
22. Further, erosion control and drainage practices employed by the Permittee's contractors during the construction activities at this Site were inadequate and resulted in discharges to Solstice Canyon Creek, a water of the State, and impacted water quality and beneficial uses.
23. The Permittee violated Order No. 2003-0017-DWQ and the 401 Water Quality Certification because the Permittee worked outside the mandated timeframe of July 1 to November 1 as established in Section 11 of the DF&G 401 Application and Certification. Therefore the Permittee did not use best management practices to avoid degrading the water quality.

CONCLUSION

24. Based on the Regional Board staff inspection of the Permittee's Solstice Creek and Corral Canyon Road Bridge Replacement Project (Site) on January 25, 2008, erosion control and drainage practices employed during the construction activities at this Site were inadequate and the construction itself took place outside the timeframe established in the 401 Application and Certification. The improper activities stated above all led to illegal discharges to the waters of the State for 45 days from January 25, 2008 to March 10, 2008, for which the Regional Board may impose administrative civil liability under section 13350 of the CWC.
25. The unauthorized placement of waste (the spoils piles) by the Permittee's contractor in the streambed where it was washed away during a rain event constituted a discharge to waters of the State. These discharges are in violation of water quality objectives established in the *Water Quality Control Plan for the Los Angeles Region* and applicable State and Federal Water Quality Standards. The Permittee's activities adversely impacted Solstice Creek.

POTENTIAL CIVIL LIABILITY

26. Section 13350(a)(2) of the CWC states that "(a) Any person who... (2) in violation of any waste discharge requirement, waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state... shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e)."
27. Pursuant to CWC section 13350(e), civil liability may be administratively imposed by a Regional Board in accordance with CWC section 13323 et seq. in an amount which shall not exceed five thousand dollars (\$5,000) for each day in which the violation occurs or ten dollars (\$10) for each gallon of waste discharged, but not both.

The maximum civil liability authorized by the CWC for violation of the requirements contained in Order No. 2003-0017-DWQ, for Count 1, is:

**COUNT I
 MAXIMUM PENALTY**

Penalty Category	Calculation	Total
<i>Failure to comply with Order No. 2003-0017-DWQ</i>	CWC section 13350(a)(2): 45 days x \$5,000/day	\$225,000
MAXIMUM ACL		\$225,000

COUNT II

28. The Regional Board realleges paragraphs 1 through 18 and asserts the following as an alternative to Count 1.

IMPACT TO THE WATERS OF THE UNITED STATES

29. As set forth in the factual assertions above, the Permittee's contractors improperly placed spoils piles and fill material in Solstice Canyon Creek, which resulted in major discharges of sediment into Solstice Canyon Creek during the January 22, 2008 and January 25, 2008 storm events. Even when a stream is temporarily diverted, the streambed itself has not moved, therefore, this placement of spoils piles and fill material into the streambed constitutes a discharge.
30. Further, erosion control and drainage practices employed by the Permittee's contractors during the construction activities at this Site proved to be inadequate and resulted in discharges to Solstice Canyon Creek, a water of the United States, and impacted water quality and beneficial uses.
31. The Permittee violated Order No. 2003-0017-DWQ and the 401 Water Quality Certification because the Permittee worked outside the mandated timeframe of July 1 to November 1 as established in Section 11 of the DF&G 401 Application and Certification. Therefore the Permittee did not use best management practices to avoid degrading the water quality.

CONCLUSION

32. The Permittee illegally discharged into waters of the United States when they placed spoils piles and fill material in Solstice Canyon Creek. The placement of the spoils piles in the creek violated best management practices as required by 401 Water Quality Certification and Order No. 2003-0017-DWQ.
33. The inadequate erosion control and drainage practices and the construction outside the mandated timeframe of July 1 to November 1 at the Site were in violation of the 401 Water Quality Certification and Order No. 2003-0017-DWQ, both issued by the State Water Resources Control Board. The State Water Resources Control Board issued this certification pursuant to CWC Section 13160 because, when issuing the certification and Order No. 2003-0017-DWQ, the State Board exercised powers delegated to the state by the Federal Water Pollution Control Act.

POTENTIAL CIVIL LIABILITY

34. Section 13376 of the CWC states that "The discharge of pollutants or dredged or fill material... by any person except as authorized by waste discharge requirements or dredged or fill material permits is prohibited..."
35. Section 13160 of the CWC states that "The state board is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act and any other federal act, heretofore or hereafter enacted, and is (a) authorized to give any certificate or statement required by any federal agency pursuant to any such federal act that there is reasonable assurance that an activity of any person subject to the jurisdiction of the state board will not reduce water quality below applicable standards, and (b) authorized to exercise any powers delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. 1251, et seq.) and acts amendatory thereto."

36. Section 13385 of the CWC states “(a) Any person who violates any of the following shall be liable civilly in accordance with this section: (1) Section 13375 or 13376... (2) Any waste discharge requirements or dredged or fill material permit issued pursuant to this chapter or any water quality certification issued pursuant to Section 13160.”
37. Pursuant to CWC section 13385(c)(1), civil liability may be administratively imposed by a Regional Board in accordance with CWC section 13323 et seq. in an amount which shall not exceed ten thousand dollars (\$10,000) for each day in which the violation occurs.

**COUNT II
MAXIMUM PENALTY**

Penalty Category	Calculation	Total
<i>Failure to comply with 401 Water Quality Certification and Order No. 2003-0017-DWQ</i>	CWC section 13385(c)(1): 45 days x \$10,000/day	\$450,000
<i>Failure to comply with CWC section 13376</i>	CWC section 13385(c)(1): 45 days x \$10,000/day	\$450,000
MAXIMUM ACL		\$900,000

RECOMMENDED CIVIL LIABILITY

38. Pursuant to sections 13327 and 13385(e) of the CWC, the Regional Board is required to consider the following factors in determining the amount of civil liability to be imposed: the nature, circumstances, extent, and gravity of the violation(s); susceptibility of the cleanup or abatement of the discharge; the degree of toxicity of the discharge; with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability and economic benefit or savings, if any, resulting from the violation; and other matters as justice may require.

a. Nature, circumstances, extent, and gravity of the violations:

The Permittee’s improper management practices during the Solstice Canyon Creek Bridge construction project lead to the pollution and degradation of water quality in Solstice Canyon Creek and consequently the Pacific Ocean. The discharges were not solely a result of natural phenomenon of an exceptional, inevitable, and irresistible character and could have been prevented or avoided by the exercise of due care or foresight by not putting the spoils piles into the creek bed, or by not constructing during the period of July 1 through November 1, as mandated by the 401 Certification. However, while the improper placement of the spoils piles and fill material was the cause of the discharge, the considerable storm made the discharge worse and more difficult to prevent. Therefore, a reduction from the maximum civil liability is warranted.

b. Susceptibility of the cleanup or abatement of the discharge:

On March 11, 2008, Regional Board staff contacted the Permittee’s representatives and requested the removal of the spoils piles. In compliance with the request, the spoils piles

were removed. Following the removal of the spoils piles, the Permittee implemented the required BMPs at the site until the end of the project. Therefore, a reduction from the maximum civil liability is warranted.

- c. Degree of toxicity of the discharge:
The discharge of material from the spoils piles resulted in a negative impact on water quality downstream by increasing turbidity and total suspended solids in waters of the State. However, because of the rain event, the discharge was part of a larger natural run-off of debris from an earlier fire event. Therefore, a reduction from the maximum civil liability is warranted.
- d. The ability of the Permittee to pay:
The Permittee has not submitted sufficient information for the Regional Board to determine the Permittee's ability to pay the maximum civil liability. It is possible; however, that the maximum liability of \$1,125,000 is in excess of the financial resources available to the Permittee because the Permittee is undertaking other water quality improvement projects. Therefore, a reduction from the maximum civil liability is warranted.
- e. The effect on the Permittee's ability to continue its business:
The Permittee has not submitted sufficient information for the Regional Board to determine the Permittee's ability to continue its business. It is possible; however, that the maximum liability of \$1,125,000 will have an effect on the Permittee's ability to continue its business because the Permittee is undertaking other water quality improvement projects. Therefore, a reduction from the maximum civil liability is warranted.
- f. Any voluntary cleanup efforts undertaken:
In addition to the Permittee's full compliance with the Regional Board request, the Permittee implemented remediation and mitigation measures to rectify the effects the Project had on the stream channel. Therefore, a reduction from the maximum civil liability is warranted.
- g. Prior history of violations:
The Permittee does not have a history of prior violations of this nature; therefore, a reduction of the maximum civil liability is warranted.
- h. Degree of culpability:
The discharge alleged in this Complaint was avoidable and the Permittee failed to implement the requirements prescribed in its 401 Water Quality Certification. However, it is clear the Permittee made efforts to have its contractor implement best management practices and to oversee the contractor prior to the rain events. Therefore, a reduction from the maximum civil liability is warranted.
- i. Economic benefit or savings:
Economic benefit or savings as a result of the illegal discharge is unknown.
- j. Other matters as justice may require:
An additional matter to consider includes time spent by the staff of the Regional Board in evaluating the incidents of violation and preparing this complaint and related documents. The Regional Board charges at a rate of \$125 per hour for staff cost recovery. With total staff time at approximately 60 hours, staff costs incurred by the Regional Board are estimated at \$7,500.

- a. After consideration of the factors in sections 13327 and 13385(e) of the CWC, the Chief Deputy Executive Officer recommends that administrative civil liability be imposed on the Permittee by the Regional Board in the amount of \$30,000.

RECOMMENDED CIVIL LIABILITY

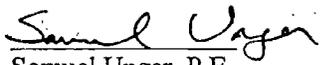
Penalty Category	Calculation	Total
<i>For failing to comply with Order No. 2003-0017-DWQ</i>	CWC section 13350(a)(2): 45 days x \$667/day	" \$30,015
TOTAL RECOMMENDED PENALTY		\$30,015

39. If the Permittee elects to pay the recommended civil liability, the administrative civil liability is due and payable and must be received by the Regional Board by the close of business on **March 18, 2010**.
40. The Permittee may waive the right to a hearing. Should the Permittee choose to waive the right to a hearing, an authorized agent must sign the waiver form attached to this complaint and return the executed waiver form to the Regional Board at 320 West 4th Street, Suite 200, Los Angeles, CA 90013 to be received by the Regional Board by the close of business on **March 18, 2010**. If the hearing is waived, the following options are available to satisfy the civil liability:
- a. A check in the amount of **\$30,015** (payable to the State Water Resources Control Board Waste Discharge Permit Fund) shall accompany the signed waiver.
41. Unless waived, a hearing before the Regional Board or Regional Board Hearing Panel (Hearing Panel) will be held within 90 days after service of this Complaint pursuant to CWC sections 13228.14 and 13323. Should the Permittee choose to waive its right to a hearing, an authorized agent must sign the waiver form attached to Complaint No. R4-2008-0041-R and return it to the Regional Board by **March 18, 2010**. If we do not receive the waiver and payment of the penalty by October 1, 2009, the matter will be heard before the Regional Board or Hearing Panel.
42. The Permittee and/or the Permittee's representative(s) will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of civil liability by the Regional Board. A notice containing the date, time, and location of the hearing will be mailed to the Permittee not less than ten (10) days prior to the hearing date. The Regional Board or a Regional Board Hearing Panel may assess a penalty higher than the recommended civil liability in this Revised Complaint.
43. The Regional Board will consider whether to affirm, reject, or modify the proposed administrative civil liability, or whether to refer the matter to the Attorney General for recovery of judicial liability in a greater amount.
44. There are no statutes of limitations that apply to administrative proceedings. The statutes of limitations contained in the California Code of Civil Procedure that refers to "actions" and

City of Malibu
Administrative Civil Liability Complaint No. R4-2008-0041-R

“special proceedings” apply to judicial proceedings, not administrative proceedings. See *City of Oakland v. Public Employees’ Retirement System* (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §405(2), p. 510.)

45. This enforcement action is exempt from the provisions of the California Environmental Quality Act, California Public Resources Code section 21000 et seq., in accordance with California Code of Regulations, title 14, section 15321.


Samuel Unger, P.E.
Assistant Executive Officer

February 16, 2010

City of Malibu

Administrative Civil Liability Complaint No. R4-2008-0041-R

WAIVER FORM

FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R4-2008-0041-R

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent The City of Malibu (Permittee) in connection with Administrative Civil Liability Complaint No. R4-2008-0041-R (Complaint). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served [with the complaint]. The person who has been issued a complaint may waive the right to a hearing."

- (OPTION 1: Check here if the Permittee waives the hearing requirement and will pay the recommended liability.)**
- a. I hereby waive any right the Permittee may have to a hearing before the Regional Water Board.
 - b. I certify that the Permittee will remit payment for the civil liability imposed in the amount of **\$30,015** by check that references "ACL Complaint No. R4-2008-0041-R" made payable to the "*Waste Discharge Permit Fund*". Payment must be received by the Regional Water Board by **March 18, 2010** or this matter will be placed on the Regional Water Board's agenda for a hearing as initially proposed in the Complaint.
 - c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after the 30-day public notice and comment period expires. Should the Regional Water Board receive significant new information or comments from any source (excluding the Water Board's Prosecution Team) during this comment period, the Regional Water Board's Assistant Executive Officer may withdraw the complaint, return payment, and issue a new complaint. I understand that this proposed settlement is subject to approval by the Regional Water Board, and that the Regional Water Board may consider this proposed settlement in a public meeting or hearing. I also understand that approval of the settlement will result in the Permittee having waived the right to contest the allegations in the Complaint and the imposition of civil liability.
 - d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Permittee to further enforcement, including additional civil liability.
- (OPTION 2: Check here if the Permittee waives the 90-day hearing requirement in order to engage in settlement discussions.)** I hereby waive any right the Permittee may have to a hearing before the Regional Water Board within 90 days after service of the complaint, but I reserve the ability to request a hearing in the future. I certify that the Permittee will promptly engage the Regional Water Board Prosecution Team in settlement discussions to attempt to resolve the outstanding violation(s). By checking this box, the Permittee requests that the Regional Water Board delay the hearing so that the Permittee and the Prosecution Team can discuss settlement. It remains within the

City of Malibu

Administrative Civil Liability Complaint No. R4-2008-0041-R

discretion of the Regional Water Board to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1."

(Print Name and Title)

(Signature)

(Date)

**HEARING PANEL OF THE
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION**

320 W. 4th Street, Suite 200
Los Angeles, California 90013
(213) 576-6600

ACLC No. R4-2008-0041-R

NOTICE OF PUBLIC HEARING

**TO CONSIDER AN ADMINISTRATIVE CIVIL LIABILITY COMPLAINT AND
PROPOSE RECOMMENDATIONS**

<u>DISCHARGER</u>	<u>DISCHARGE LOCATION</u>	<u>RECEIVING WATERS</u>
City of Malibu Solstice Canyon Creek Project	26023 Pacific Coast Highway Malibu, California	Solstice Canyon Creek

Revised Administrative Civil Liability Complaint (“ACLC”) No. R4-2008-0041-R alleges that the City of Malibu (Permittee) has violated waste discharge requirements contained in State Water Board Order No. 2003-0017-DWQ and the Federal Clean Water Act Section 401 by failing to implement all terms and conditions prescribed in its Clean Water Act section 401 Certification during the period January 25, 2008 through March 10, 2008. As stated in the ACLC, Regional Board staff, represented by the Regional Board Staff Prosecution Team (Prosecution Team), recommends that a penalty of \$30,000 be assessed against the City of Malibu for these violations.

Pursuant to Water Code section 13228.14, a Hearing Panel consisting of three members of the California Regional Water Quality Control Board, Los Angeles Region (“Regional Board”) will convene a hearing to hear evidence, determine facts, and to propose a recommendation to the Regional Board about resolution of the ACLC.

This notice sets forth procedures to be used by hearing panels of the Regional Board and outlines the process to be used at this hearing.

I. HEARING DATE AND LOCATION

Date: May 17, 2010
Time: 10:00 A.M.
Place: 320 W. 4th Street
Los Angeles, CA 90013

- Room location TBD

II. AVAILABILITY OF DOCUMENTS

The ACLC, related documents, proposed order, comments received, and other information about the subject of the ACLC are available for inspection and copying between the hours of 8:00 a.m. and 5:00 p.m. at the following address:

California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Arrangements for file review and/or copies of the documents may be made by calling the Los Angeles Regional Board at (213) 576-6600.

The entire file will become a part of the administrative record of this proceeding, irrespective of whether individual documents are specifically referenced during the hearing. However, the entire file might not be available at the hearing. Should any parties or interested persons desire that the Prosecution Team bring to the hearing any particular documents that are not included in the Hearing Panel binder, they must submit a written or electronic request to the Prosecution Team during business hours, not later than **April 27, 2010**. The request must identify the documents with enough specificity for the Prosecution Team to locate them. (Documents in the Hearing Panel binder will be present at the hearing.)

III. NATURE OF HEARING

This will be a formal adjudicative hearing pursuant to part 648 et seq. of title 23 of the California Code of Regulations. Chapter 5 of the California Administrative Procedure Act (commencing with section 11500 of the Government Code) relating to formal adjudicative hearings does not apply to adjudicative hearings before the Regional Board, except as otherwise specified in the above-referenced regulations.

IV. PARTIES TO THE HEARING

The following are the parties to this proceeding:

1. The City of Malibu
2. Regional Board Staff Prosecution Team

All other persons who wish to participate in the hearing as a designated party shall request party status by submitting a written or electronic request to the Legal Advisor to the Hearing Panel identified in section VIII below no later than **April 5, 2010**. The request shall include a statement explaining the reasons for their request (e.g., how the issues to be addressed in the hearing and the potential actions by the Regional Board affect the person), and a statement explaining why the party or parties designated above do not adequately represent the person's interest. The requesting party

will be notified before the hearing whether the request is granted. All parties will be notified if other persons are so designated.

V. COMMUNICATIONS WITH THE PROSECUTION TEAM

The California Administrative Procedure Act requires the Regional Board to separate prosecutorial and adjudicative functions in matters that are prosecutorial in nature. A Prosecution Team, comprised of the Regional Board enforcement and other staff, will serve as the complainant in the proceedings and is a designated party. The Case Manager over this matter, who will coordinate the efforts of the Prosecution Team, is Mercedes Merino. Jeffery Ogata, Senior Staff Counsel for the Regional Board, will advise the Prosecution Team prior to and at the panel hearing. Mr. Ogata is currently advising the Regional Board in other unrelated matters, but neither Mr. Ogata nor the members of the Prosecution Team will be advising the Regional Board in this matter or have engaged in any substantive conversations regarding the issues involved in this proceeding with any of the Board Members or the advisors to the hearing panel (identified below).

Any communication with the Prosecution Team prior to the hearing should be directed to the Case Manager:

Mercedes Merino
320 W. 4th Street, Suite 200
Los Angeles, CA 90013
(213) 620-6369
mmerino@waterboards.ca.gov

VI. PUBLIC COMMENTS AND SUBMITTAL OF EVIDENCE

A. Submittals By Parties.

Not later than **March 26, 2010**, the prosecution Team will send the parties a preliminary Hearing Panel binder containing the most pertinent documents related to this proceeding and a PowerPoint presentation, which summarizes the evidence and testimony that the Prosecution Team will present and rely upon at the hearing.

The City of Malibu and other designated parties are required to submit:

- 1) Any additional documents or evidence the Party/ies want(s) the Hearing Panel to consider,
- 2) A summary of any testimony the Party/ies intend(s) to present, and
- 3) A statement regarding how much time the Party/ies need(s) to present the case to the attention of the Case Manager of the Prosecution Team (as identified above) and other designated parties no later than close of business on **April 19, 2010**. The Prosecution Team shall have the right to present additional evidence in rebuttal of matters submitted by any other party.

The Prosecution Team will send to the Hearing Panel and the parties a final Hearing Panel binder no later than **May 6, 2010**.

B. Submittals By Interested Persons.

Persons who are not designated as parties, above, that wish to comment upon or object to the proposed ACLC, or submit evidence for the Hearing Panel to consider, are invited to submit them in writing to the Prosecution Team (as identified above). To be evaluated and responded to by Prosecution Team, included in the final Hearing Panel binder, and fully considered by the Hearing Panel in advance of the hearing, any such written materials must be received no later **March 18, 2010**. If possible, please submit written comments in Word format electronically to mmerino@waterboards.ca.gov. Interested persons should be aware the Regional Board is entitled to settle this matter without further notice, and therefore a timely submittal by this date may be the only opportunity to comment upon the subject of this ACLC. If the hearing proceeds as scheduled, the Hearing Panel will also receive oral comments from any person during the hearing (see below).

VII. HEARING PROCEDURES

Adjudicative proceedings before the Hearing Panel generally will be conducted in the following order:

- Opening statement by Hearing Panel Chair
- Administration of oath to persons who intend to testify
- Prosecution Team presentation
- Discharger presentation
- Designated parties' presentation (if applicable)
- Interested persons' comments
- Prosecution Team rebuttal
- Questions from Hearing Panel
- Deliberations (in open or closed session)
- Announcement of recommendation to the Regional Board

While this is a formal administrative proceeding, the Hearing Panel does not generally require the cross examination of witness, or other procedures not specified in this notice, that might typically be expected of parties in a courtroom.

Parties will be advised by the Hearing Panel after the receipt of public comments, but prior to the date of the hearing, of the amount of time each party will be allocated for presentations. That decision will be based upon the complexity and the number of issues under consideration, the extent to which the parties have coordinated, the number of parties and interested persons anticipated, and the time available for the hearing. The parties should contact the Case Manager not later than **April 19, 2010** to state how much time they believe is necessary for their presentations (see Section VI. A above). It is the Regional Board's intent that reasonable requests be accommodated.

Interested persons are invited to attend the hearing and present oral comments. Interested persons may be limited to approximately five (5) minutes each, for their presentations, in the discretion of the Chair, depending on the number of persons wishing to be heard. Persons with similar concerns or opinions are encouraged to choose one representative to speak.

For accuracy of the record, all important testimony should be in writing, and delivered as set forth above. The Hearing Panel will include in the administrative record written transcriptions of oral testimony or comments made at the hearing.

VIII. COMMUNICATIONS WITH THE HEARING PANEL

A. Ex Parte Communications Prohibited.

As an adjudicative proceeding, Regional Board members and their advisors may not discuss the subject of this hearing with any person, except during the public hearing itself, except in the limited circumstances and manner described in this notice. **Any communications to the Regional Board, Hearing Panel, or Hearing Panel Advisors before the hearing must also be copied to the Prosecution Team and other Party(ies), as identified above.**

B. Hearing Panel Advisors.

The Hearing Panel will be advised before and during the hearing by Executive Officer Tracy Egoscue, and a Legal Advisor, Michael Levy, Senior Staff Counsel for the Regional Board. While Ms. Egoscue exercises general oversight over the staff's enforcement activities, neither she nor Mr. Levy have exercised any authority or discretion over the Prosecution Team, or advised them with respect to this matter.

C. Objections to manner of hearing and resolution of any other issues.

1. Parties or interested persons with procedural requests different from or outside of the scope of this notice should contact the Case Manager at any time, who will try to accommodate the requests. Agreements between a party and the Prosecution Team will generally be accepted by the Hearing Panel as stipulations.
2. Objections to (a) any procedure to be used during this hearing, (b) any documents or other evidence submitted by the Prosecution Team, or (c) any other matter set forth in this notice, must be submitted in writing no later than **April 19, 2010** to the Legal Advisor to the Hearing Panel:

Michael Levy
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814
(916) 341-5193
mlevy@waterboards.ca.gov

Untimely objections will be deemed waived. Procedural objections about the matters contained in this notice will not be entertained at the hearing. Further, except as otherwise stipulated, any procedure not specified in this hearing notice will be deemed waived pursuant to section 648(d) of Title 23 of the California Code of Regulations, unless a timely objection is filed.

3. Any issues outside the scope of those described in section C.2, above, that cannot be resolved by stipulation shall be brought to the attention of the Legal Advisor to the Hearing Panel, as set forth in section C.2, by **April 19, 2010** if possible, and if not possible, then at the earliest possible time with an explanation about why the issue could not have been raised sooner.

IX. APPLICABILITY OF NOTICE

The Executive Officer has directed the use of this standard notice in an order dated March 5, 2008. If you have any questions about this Notice of Public Hearing, please contact as appropriate, the Case Manager of the Prosecution Team, or the Legal Advisor to the Hearing Panel as described above.

Date: **February 17, 2010**

EXHIBIT “34”

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2007-0010

In the Matter of the Petition of

ESCONDIDO CREEK CONSERVANCY AND SAN DIEGO COASTKEEPER

For Review of Administrative Civil Liability Order No. R9-2006-0095
for the City of Escondido Hale Avenue Resource Recovery Facility
Issued by the
California Regional Water Quality Control Board,
San Diego Region

SWRCB/OCC FILE A-1796

BY THE BOARD:

On October 11, 2006, the San Diego Regional Water Quality Control Board (San Diego Water Board) issued Order No. R9-2006-0095 (Settlement Order). The Settlement Order resolved potential liability by the City of Escondido (City) for violations alleged in Administrative Civil Liability (ACL) Complaint R9-2005-0265. The Escondido Creek Conservancy and the San Diego Coastkeeper filed a timely petition requesting review by the State Water Resources Control Board (State Water Board). In this Order, the State Water Board grants the petition and remands the matter to the San Diego Water Board.

I. BACKGROUND

The City owns and operates the Hale Avenue Resource Recovery Facility (HARRF), an activated sludge wastewater treatment facility. Primarily, the City discharges secondary treated effluent through the Escondido Land Outfall that runs approximately nine miles along Escondido Creek and the San Elijo Lagoon in accordance with Order No. R9-2005-0101, national pollutant discharge elimination system (NPDES) No. CA0108971. During extreme wet weather conditions, the City discharges tertiary-treated effluent to Escondido Creek pursuant to Order No. R9-2003-0394, NPDES No. CA0108944.

On November 30, 2004, the San Diego Water Board Executive Officer issued ACL Complaint R9-2004-0421 to the City in response to self-monitoring reports indicating

393 violations of effluent limitations.¹ These alleged violations occurred between May 3 and August 17, 2004 (2004 violations) and are subject to mandatory minimum penalties (MMPs) in accordance with Water Code section 13385. The San Diego Water Board ordered the City to conduct a technical investigation.² The City's technical report states that the exceedances might have been caused by illegal discharges to the sewer system, which resulted in an upset of the biological processes of the HARRF.

The San Diego Water Board requested the assistance of the State Water Board's Compliance Assurance and Enforcement Unit in reviewing the HARRF's records and the City's technical report to determine the cause of the violations.³ The technical report concluded that elevated levels of chemicals appeared to have entered the HARRF, but that the permit violations were likely caused by a combination of events, most of which could have been controlled by properly trained and equipped HARRF staff. The technical report further concluded that the long duration of the violation is more consistent with operational control problems than with the City's toxic load theory.

On December 30, 2005, the San Diego Water Board Executive Officer issued ACL Complaint R9-2005-0265 (Complaint). The Complaint sought a total of \$1,335,000 in MMPs and \$462,250 in discretionary liability, for a recommended civil liability of \$1,797,150.⁴ The Complaint incorporated the alleged violations from the 2004 complaint, as well as liability for additional alleged violations, some of which were subject to discretionary civil liability and some of which were subject to additional MMPs.⁵ The additional alleged violations subject to MMPs include forty-seven violations of effluent flow limitations prescribed in Order No. 99-72 (NPDES No. CA0107981) and eleven exceedances of nitrate and nitrogen effluent limitations

¹ At the time these violations occurred, the City's waste discharge requirements were set forth in Order No. 99-72, NPDES No. CA0107981.

² San Diego Water Board Order No. R9-2005-0077.

³ The Compliance Assurance and Enforcement Unit's technical investigation occurred on January 5 and 6, 2005, with the report completed on April 7, 2005. The report was prepared on behalf of the San Diego Water Board and a separation of functions has been invoked. State Water Board enforcement staff have not advised or otherwise participated in the review of this petition or preparation of this Order.

⁴ The total sum contained in the Complaint and Settlement Order is incorrect, but all parties have used that figure throughout the settlement process and for purposes of this petition.

⁵ The discretionary liability alleged in the Complaint includes: a 73,500 gallon unpermitted discharge of secondary effluent to Escondido Creek in violation of San Diego Water Board Order No. 99-72 (NPDES No. CA0107981); a 280,000 gallon unpermitted discharge of secondary effluent to Escondido Creek in violation of Order No. R9-2003-0394; sixteen violations of effluent limitations prescribed in waste discharge requirements set forth in San Diego Water Board Order No. 93-70; fifteen reporting violations relating to Cease and Desist Order No. 96-31; and, failure to comply with a compliance due date contained in Cease and Desist Order No. 96-31.

prescribed in Order No. R9-2003-0394 (NPDES No. CA0108944). The City asserts that these violations were caused by high rainfall events occurring between January and March 2005 (2005 violations).

In response to the Complaint, the City requested that the San Diego Water Board staff enter into settlement negotiations. After several negotiation meetings, the City submitted a settlement offer and it was presented to the San Diego Water Board on September 13, 2006. No comments had been made during the comment period, but counsel for the petitioners spoke at the meeting, challenging the settlement. The San Diego Water Board voted to defer its decision so that its staff could provide additional information demonstrating whether the City could raise the affirmative defenses alleged.

Board member agenda packets for the next meeting, on October 11, 2006, contained the technical reports prepared by the City, the Compliance Assurance and Enforcement Unit, and the San Diego Water Board staff. At the October meeting, the San Diego Water Board adopted the Settlement Order. The Settlement Order imposes civil liability in the amount of \$1,162,150. Of that amount, the Settlement Order requires that the City deposit \$690,000 into the State Water Board Cleanup and Abatement Account and provides that \$462,150 shall be suspended and waived if the City submits a final copy of two technical studies.⁶ The total liability specified in the Settlement Order is less than the MMP liability identified in the Complaint. Moreover, it appears that the San Diego Water Board reduced the City's total liability by \$645,000 based solely on the City's assertion of affirmative defenses to the MMPs.

II. ISSUES AND FINDINGS

The petition raises a number of issues. Most of these issues are not substantial or appropriate for review by the State Water Board and will not be discussed in this Order.⁷ The single issue addressed in this Order concerns a regional board's discretion to settle MMPs in an administrative action.

⁶ The studies are entitled "Wastewater Treatment and Disposal Facilities Capacity Study" and "Final Project Report." Both were required to be submitted to the San Diego Water Board by December 29, 2006. These studies were undertaken by the City of its own initiative. The total amount being assessed under the Settlement Order is correctly stated in the introductory paragraph. However, in the first ordering paragraph on page 4 of the Settlement Order, the total amount assessed is incorrectly stated as \$1,162,500.

⁷ See *People v. Barry* (1987) 194 Cal.App.3d 158, 175-177; *Johnson v. State Water Resources Control Bd.* (2004) 123 Cal.App.4th 1107; Cal. Code Regs., tit. 23, § 2052, subd. (a)(1).

In 1999, the Legislature enacted two laws to establish mandatory minimum penalties for certain violations of NPDES permits.⁸ Each bill contained a legislative finding that then-current “enforcement efforts of the state board and the regional boards may not be achieving full compliance with waste discharge requirements in a timely manner.”⁹ The statute states that an MMP “shall be assessed” for each serious violation.¹⁰ The plain language of the statute removes discretion from the water boards regarding the minimum amount that they must assess when a serious violation has occurred.¹¹ As a result, Water Code section 13385 now provides for administrative civil liability that *may* be assessed by discretionary action (subdivisions (c) – (g)), but identifies certain violations where any civil liability *must* recover minimum penalties of \$3,000 for each violation (subdivisions (h) – (l)).

When a water board has established that a serious violation has occurred, the discharger is liable.¹² There are three affirmative defenses to liability available to the discharger, but the discharger bears the burden of proving that one of these defenses relieves it of liability for MMPs under Water Code section 13385.¹³ Proof of any of the three defenses with respect to a violation suspends the MMP provisions of section 13385 for that violation. The MMP provisions do not apply when a violation is caused by (1) an act of war, (2) an unanticipated, grave natural disaster, or (3) an intentional act of a third party.¹⁴

When violations subject to MMPs have been alleged and a complaint issued, the water boards may formulate and issue decisions by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding.¹⁵ The terms of a settlement, however, may not be contrary to statute or regulation, except that the settlement may include sanctions

⁸ Stats. 1999, ch. 92 (Assem. Bill No. 1104) & Stats. 1999, ch. 93 (Sen. Bill No. 709).

⁹ *City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 724 (quoting Stats. 1999, ch. 92, § 2, subd. (d) [Assem. Bill No. 1104]; ch. 93, § 2, subd. (d) [Sen. Bill No. 709]).

¹⁰ Water Code, § 13385, subd. (h)(1). “Serious violations” are defined in Water Code section 13385, subdivision (h)(2).

¹¹ Discretionary administrative civil liability may be assessed for violations of NPDES permits for which civil liability may be assessed, but for which MMPs are not mandated. The issue discussed herein concerns only the portions of the Complaint and the Settlement Order subject to MMPs.

¹² *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at 723-724 (the Clean Water Act is a strict liability statute and section 13385 is part of California’s NPDES program); see also *U.S. v. Allegheny Ludlum Corp.* (3rd Cir. 2004) 366 F.3d 164, 168; *Stoddard v. Western Carolina Regional Sewer Auth.* (4th Cir. 1986) 784 F.2d 1200, 1208; *U.S. v. Earth Sciences, Inc.* (10th Cir. 1979) 599 F.2d 368, 374.

¹³ *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at 726.

¹⁴ Wat. Code, § 13385, subd. (j).

¹⁵ Gov. Code, § 11415.60, subd. (a).

the agency would otherwise lack the power to impose.¹⁶ In other words, once MMP violations have been alleged and a complaint issued, any resulting settlement agreement cannot be for an amount lower than the statutory minimum, absent a finding that the allegation was made in error or one of the affirmative defenses applies.¹⁷

The Settlement Order resolved potential civil liability for violations alleged in the Complaint at a level below the statutory minimum. In the Complaint, the total amount proposed for violations subject to MMPs was \$1,335,000.¹⁸ The total amount of the Settlement Order is \$1,162,150, of which \$462,150 was suspended. In the Settlement Order, the San Diego Water Board stated that the City “has asserted” that the 2004 violations were caused by an intentional act of a third party and by a single operational upset.¹⁹ The Settlement Order also states that the City “asserted” that the 2005 violations were caused by severe unanticipated rainfall events.

While the City has the burden to prove an affirmative defense,²⁰ the San Diego Water Board did not make any findings as to the merit of these assertions or as to whether they constituted affirmative defenses.²¹ There was no determination that any of the affirmative defenses were proven or that there was a single operational upset that caused the 2004 violations. The San Diego Water Board explained in its findings that by accepting the City’s settlement offer and avoiding the need for an administrative hearing and possible judicial review, it was conserving valuable staff resources.

The State Water Board is fully aware of limited staff resources, but administrative settlements cannot diminish or avoid the imposition of MMPs for serious violations. If violations occur that are subject to MMPs and an administrative civil liability complaint is issued, any administrative action that results in a fine lower than the minimum statutory requirement must be accompanied by a determination either that the MMP was not correctly assessed or that the

¹⁶ *Id.*, subd. (c).

¹⁷ See State Water Resources Control Board, Water Quality Enforcement Policy (2002), p. 41.

¹⁸ This figure is the minimum amount that may be assessed under Water Code section 13385, based on the San Diego Water Board’s calculation of occurrences of serious violations.

¹⁹ The claim that the 2004 violations resulted from a single operational upset is not an affirmative defense to MMP liability, but instead is relevant to assessing the number of violations. (Wat. Code, § 13385, subd. (f).)

²⁰ *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at 726.

²¹ In the draft version of the Settlement Order prepared for the San Diego Water Board’s September 13, 2006 meeting, it stated, “[f]or purposes of settlement of this matter, the Regional Board is accepting the City’s defense without a finding of fact.” This language was removed from the version adopted at the October 11, 2006 meeting, but no findings were added.

discharger proved an appropriate affirmative defense. For example, if the San Diego Water Board had determined that the number of violations had been incorrectly stated in the Complaint or that the 2005 violations were caused by a grave and unanticipated natural disaster, there would have been a basis for lowering the MMPs. Otherwise, negotiations can only consider figures between the amount proposed for assessment and the statutory minimum liability.

The Legislature removed discretion from the water boards when it enacted MMPs in 1999. If the discharger asserts one of the permitted defenses, then it bears the burden of proof.²² The discharger must present evidence so that the regional water board can make a factual determination as to the asserted defense and on review the State Water Board must be able to determine what the regional board's factual determination was and whether that determination is supported by substantial evidence.²³ In the case of MMPs, a water board cannot simply accept a discharger's "assertions" of an affirmative defense—the board must weigh those claims and make appropriate findings supported by the record.²⁴

In passing, we observe that on remand the San Diego Water Board must consider the affirmative defenses in justifying its decision to reduce the MMPs by at least \$645,000. The Complaint sought \$1,335,000 in MMPs and an additional \$462,250 in discretionary liability. The Settlement Order imposes civil liability in the amount of \$1,152,150, without characterizing the amount as for MMPs or discretionary liability. Moreover, \$462,150 of the liability shall be suspended and waived if the City submits a final copy of two technical studies. The suspended amount does not appear to be for a supplement environmental project, as contemplated by Water Code section 13385, subdivision (f). As a result, the \$462,150 cannot be in lieu of an MMP. The effect of the settlement order was to reduce the Complaint's MMP amount from \$1,335,000 to no more than \$690,000. At the same time, there are some

²² *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at 726; *City & County of San Francisco v. San Francisco Civil Service Assn., Local 400* (1979) 94 Cal.App.3d 522, 531-532.

²³ See *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.

²⁴ We do not address here, or make any determination as to whether a formal hearing is required in every case where a staff person, or even the Executive Officer, asserts that violations have occurred that require an MMP. For example, there could be a Notice of Violation that makes similar statements, but upon receiving the discharger's explanation, he or she may realize that the calculation was in error. In such a case, the Executive Officer may be able to revise his or her opinion based on the explanation. But in this case, a formal complaint was issued, the staff had evaluated and rejected the discharger's claims regarding calculation, and the discharger was relying on affirmative defenses to the MMPs. In adopting the Settlement Order, the San Diego Water Board specifically declined to make its own determination as to whether the MMP alleged in the Complaint must be lowered. A settlement for less than the MMP may well have thwarted the statute, since it was only the discharger who claimed that the reduced amount was justified.

indications that the entire settlement amount was being collected as a discretionary civil liability.²⁵ On remand, the San Diego Water Board should resolve the allocation between MMPs, if any, and discretionary liability.

ORDER

IT IS HEREBY ORDERED that Order number R9-2006-0095 for settlement of Administrative Civil Liability Complaint number R9-2005-0265 for the City of Escondido Hale Avenue Resource Recovery Facility is vacated and the matter is remanded to the San Diego Water Board. The San Diego Water Board must either withdraw or revise the Complaint, making specific findings as to the alleged violations, or hold a hearing and make factual determinations as to any affirmative defenses alleged by the City. The amount of liability to be assessed must be no less than the minimum liability required by Water Code section 13385, based on the factual determinations of the San Diego Water Board or, where appropriate, its Executive Officer.

CERTIFICATION

The undersigned, Acting Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 2, 2007.

AYE: Tam M. Doduc
Gary Wolff, P.E., Ph.D.
Arthur G. Baggett, Jr.
Frances Spivy-Weber
Charles R. Hoppin

NO: None

ABSTAIN: None

ABSENT: None



Jeanine Townsend
Acting Clerk to the Board

²⁵ Settlement Order, Finding 15 (noting that the San Diego Water Board considered the factors of Water Code, section 13385, subdivision (e) in establishing the entire \$1,162,150 liability, but that subdivision is inapplicable to MMPs).

EXHIBIT “35”

STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION
320 W. 4th Street, Suite 200, Los Angeles

FACT SHEET
WASTE DISCHARGE REQUIREMENTS
for
CITY OF REDONDO BEACH
(SEASIDE LAGOON)

NPDES Permit No.: CA0064297
Public Notice No.: 05-004

FACILITY ADDRESS
200 Portofino Way
Redondo Beach, CA 90277

FACILITY MAILING ADDRESS
302 Knob Hill
Redondo Beach, CA 90277
Contact: Mile Shay
Telephone: (310) 318-0661 ext. 2455

I. Public Participation

The California Regional Water Quality Control Board, Los Angeles Region (Regional Board) is considering the issuance of Waste Discharge Requirements (WDRs) that will serve as a National Pollutant Discharge Elimination System (NPDES) permit for the Seaside Lagoon Facility (Seaside Lagoon or Facility) . As an initial step in the WDR process, the Regional Board staff has developed tentative WDRs. The Regional Board encourages public participation in the WDR adoption process.

A. Written Comments

The staff determinations are tentative. Interested persons are invited to submit written comments concerning these tentative WDRs. Comments should be submitted either in person or by mail to:

Executive Officer
California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

To be fully responded to by staff and considered by the Regional Board, written comments should be received at the Regional Board offices by 5:00 p.m. on February 11, 2005.

B. Public Hearing

The Regional Board will hold a public hearing on the tentative WDRs during its regular Board meeting on the following date and time and at the following location:

Date: March 3, 2005
Time: 9:00 a.m.
Location: The City of Simi Valley Council Chambers,
2929 Tapo Canyon Road, Simi Valley, California.

Interested persons are invited to attend. At the public hearing, the Regional Board will hear testimony, if any, pertinent to the discharge, WDRs, and permit. Oral testimony will be heard; however, for accuracy of the record, important testimony should be in writing.

Please be aware that dates and venues may change. Our web address is <http://www.waterboards.ca.gov/losangeles/> where you can access the current agenda for changes in dates and locations.

C. Waste Discharge Requirements Appeals

Any aggrieved person may petition the State Water Resources Control Board to review the decision of the Regional Board regarding the final WDRs. The petition must be submitted within 30 days of the Regional Board's action to the following address:

State Water Resources Control Board, Office of Chief Counsel
ATTN: Elizabeth Miller Jennings, Senior Staff Counsel
1001 I Street, 22nd Floor
Sacramento, CA 95814

D. Information and Copying

The Report of Waste Discharge (ROWD), related documents, tentative effluent limitations and special conditions, comments received, and other information are on file and may be inspected at 320 West 4th Street, Suite 200, Los Angeles, California 90013, at any time between 8:30 a.m. and 4:45 p.m., Monday through Friday. Copying of documents may be arranged through the Los Angeles Regional Board by calling (213) 576-6600.

E. Register of Interested Persons

Any person interested in being placed on the mailing list for information regarding the WDRs and NPDES permit should contact the Regional Board, reference this facility,

and provide a name, address, and phone number.

II. Introduction

The City of Redondo Beach (hereinafter, the City or Discharger) discharges dechlorinated water from the Seaside Lagoon to King Harbor, a water of the United States. Wastes discharged from Seaside Lagoon by the City are regulated by WDRs and a NPDES permit contained in Board Order No. 99-057 (NPDES Permit No. CA0064297). Order No. 99-057 expired on June 10, 2004.

The City filed a Report of Waste Discharge and applied for renewal of its NPDES permit on April 9, 2004. The tentative permit is the reissuance of the WDRs and NPDES permit for discharges from Seaside Lagoon. A NPDES permit compliance evaluation inspection (CEI) was conducted on March 31, 2004, to observe operations and collect additional data to develop permit limitations and conditions.

III. Description of Facility and Waste Discharge

Seaside Lagoon, located at 200 Portofino Way, Redondo Beach, California, is owned and operated by the City. The Facility is a city park and consists of a 1.4 million gallon man-made saltwater lagoon, artificial beaches, children's play area, snack bar facilities, and other recreational areas. The Seaside Lagoon was constructed in 1962 and has since been open to the public for swimming from Memorial Day to Labor Day each year. At other times, the City may allow the use of the Lagoon and nearby facilities for social functions which may result in discharges into the receiving water outside the designated operational season. The surface area of the water in the Lagoon is approximately 1.2 acres with a maximum depth of 7 feet.

Water for Seaside Lagoon comes from a nearby steam generating plant (AES Redondo Beach, L.L.C., Power Plant) where seawater is used to cool turbines. The Power Plant is located at 1100 Harbor Drive, Redondo Beach. When operated at design capacity, the AES Power Plant discharges up to 898 million gallons per day (mgd) of once-through cooling water combined with small volumes of metal cleaning and low-volume wastes into the Pacific Ocean at Santa Monica Bay. This discharge is regulated under separate waste discharge requirements contained in Board Order No. 00-085. Approximately 3,200 gallons per minute (gpm), which is equivalent to 2.3 mgd (constitute approximately 0.26 % of total Power plant cooling water), of once-through cooling water is directed to the Seaside Lagoon.

To maintain the water level in the Lagoon, the City discharges roughly 3,200 gpm (approximately 2.3 mgd) of dechlorinated saltwater to King Harbor when the Lagoon is in use. The water is discharged through three overflow structures located along the northwest edge of the lagoon. The water then flows by gravity to a manhole, then to a conduit that empties into King Harbor at the shoreline (Latitude 33° 50' 38"N and Longitude 118° 23' 47"

W) embankment, Discharge Serial 001. During periods when the Lagoon is not open for public use, the Lagoon water is flushed periodically.

The water supply system is equipped with both chlorination and de-chlorination facilities. The chlorination system consists of one, 1,000-gallon storage tank, which holds 17% sodium hypochlorite, dual chemical feed pumps with manual controls, and related piping. The de-chlorination system consists of one, 1,000-gallon storage tank which holds 38% bi-sulfate, dual chemical feed pumps with manual controls, and related piping. The de-chlorination piping terminates at the overflow structures at which point the bi-sulfite solution is added to the effluent. Bi-sulfite is added at all three overflow structures.

The Discharger described a proposed Facility modification in the permit renewal application: to construct a re-circulation pipe at the overflow collector pipe (prior to the discharge vault) to direct lagoon water back to the Lagoon. A valve will be installed in the vault to stop all flow from being discharged. The de-chlorination system will be shut down and a chlorination feed pipe connected the re-circulation piping would allow chlorinated water to circulate in the lagoon and collector pipe. The modification will reduce the amount of bacteria in the discharge.

In the renewal application, the Discharger also requested that the residual chlorine effluent limitation be relaxed. It should be noted that the available effluent data indicated that the Discharger has exceeded the effluent limitation for residual chlorine on various occasions.

The Regional Board and the U.S. EPA have classified the Seaside Lagoon facility as a minor discharge.

Available Discharge Monitoring Reports (DMRs) submitted to the Regional Board include all monitoring reports for the years 1999, 2000, 2001, 2002, and 2003. The available DMR data are summarized in the following Table:

Pollutant	Units	Monthly Average Effluent Limitations	Daily Maximum Effluent Limitations	Range of Reported Values
Flow	MGD	--	--	2.5
Temperature	°F	--	100	66 – 81
pH	S.U.	--	6.0 – 9.0	6.29 – 8.0
Total Suspended Solids (TSS)	mg/L	50	150	1.7 – 84
5-Day Biochemical Oxygen Demand (BOD ₅ 20°C)	mg/L	20	30	<1 – 9

Pollutant	Units	Monthly Average Effluent Limitations	Daily Maximum Effluent Limitations	Range of Reported Values
Oil and Grease	mg/L	10	15	<0.1 – 2.4 ⁴
Turbidity	NTU	50	150	0.25 – 20
Total Coliform	mpn/100 ml	1,000 ¹	10,000 ¹	<1 – 900
Fecal Coliform	mpn/100 ml	200 ²	--	<1 – 280
Enterococcus	mpn/100 ml	24 ³	--	<1 – >1,600
Residual Chlorine	µg/L	2	8	<10 – 1,800

1. The density of total coliform organisms shall be less than 1,000 per 100 ml (10 per ml): provided that not more than 20 percent of the samples, in any 30-day period, may exceed 1,000 per 100 ml (10 per ml), and provided further that no single sample when verified by a repeat sample taken within 48 hours shall exceed 10,000 per 100 ml (100 per ml).
2. The fecal coliform density for any 30-day period, shall not exceed a geometric mean of 200 per 100 ml nor shall more than 10 percent of the total samples during any 60-day period exceed 400 per 100 ml.
3. The geometric mean enterococcus density of the discharge shall not exceed 24 organisms per 100 ml for a 30-day period or 12 organisms per 100 ml for a 6-month period.
4. Value of <6 also reported.

A review of effluent monitoring data indicates that the Discharger may have exceeded the effluent limitation for Enterococcus in June 2002 and June 2003. Further, the available effluent monitoring data indicate that the Discharger has had multiple exceedances of the existing effluent limitations for total suspended solids (TSS) and total residual chlorine. The Regional Board issued a Notice of Violation (NOV) on May 4, 2001, addressing violations of effluent limitations for BOD and residual chlorine, for the period from July 1999 through August 2000. The City responded to the NOV in correspondence dated July 16, 2001. In the July 16, 2001, response, the City states that several laboratories were unable to detect residual chlorine accurately below 0.01 mg/L (the existing residual chlorine monthly average effluent limitation is 2 µg/L, or 0.002 mg/L) and that the monitoring location established in Order No. 99-057 is inappropriate for this facility. Further, the City requested that the residual chlorine effluent limitation be revised to 0.01 mg/L, and that the NOV be rescinded.

An Administrative Civil Liability (ACL) was issued to the City on March 29, 2002, in the amount of \$51,000 for violation of the residual chlorine effluent limitation. The City responded on April 10, 2002, and submitted payment to the Regional Board and committed the preparation of a Supplemental Environmental Project, subject to Regional Board approval.

Effluent characteristics as stated by the Discharger in the permit renewal application are summarized below:

Pollutant	Units	Maximum Daily Value	Average Daily Value
Discharge Flow	mgd	2.3	2.3
pH	Std. units	6.3 – 6.6	--
Temperature	• C	27	22
BOD ₅ 20°C	mg/L	<2.0	<20
	lbs/day	<38	<38
TSS	mg/L	84	75
	lbs/day	1,611	1,438
Fecal Coliform	mpn/100 ml	280	27
Residual Chlorine	µg/L	<10	<10
	lbs/day	0.2	0.2
Oil and Grease	mg/L	<6	<6
	lbs/day	<115	<115

It should be noted that the detection limits for residual chlorine presented in the renewal application are greater than the existing effluent limitation for residual chlorine.

IV. Applicable Plans, Policies, and Regulations

The requirements contained in the proposed permit are based on the requirements and authorities contained in the following:

- A. The federal Clean Water Act (CWA). The federal Clean Water Act requires that any point source discharges of pollutants to a water of the United States must be done in conformance with an NPDES permit. NPDES permits establish effluent limitations that incorporate various requirements of the CWA designed to protect water quality.
- B. Code of Regulations, Title 40 (40 CFR) – Protection of Environment, Chapter I, Environmental Protection Agency, Subchapter D, Water Programs, Parts 122-125 and Subchapter N, Effluent Guidelines. These CWA regulations provide effluent limitations for certain dischargers and establish procedures for NPDES permitting, including how to establish effluent limitations for certain pollutants discharged from Seaside Lagoon.
- C. On June 13, 1994, the Regional Board adopted a revised *Water Quality Control Plan for the Coastal Watersheds of Los Angeles and Ventura Counties* (Basin Plan). The Basin Plan contains water quality objectives and beneficial uses for inland surface waters and for the Pacific Ocean. The Basin Plan contains beneficial uses and water

quality objectives for King Harbor (H.U. 405.12), an inland surface waterbody.

Existing uses: Industrial service supply; navigation; water contact recreation; non-contact water recreation; commercial and sport fishing; marine habitat; wildlife habitat; rare, threatened, or endangered species.

- D. The State Water Resources Control Board (State Board) adopted a *Water Quality Control Plan for Control of Temperature in the Coastal and Interstate Water and Enclosed Bays and Estuaries of California* (Thermal Plan) on May 18, 1972, and amended this plan on September 18, 1975. This plan contains temperature objectives for inland surface waters.
- E. On May 18, 2000, the U.S. Environmental Protection Agency (U.S. EPA) promulgated numeric criteria for priority pollutants for the State of California [known as the *California Toxics Rule* (CTR) and codified as 40 CFR § 131.38]. In the CTR, U.S. EPA promulgated criteria that protect the general population at an incremental cancer risk level of one in a million (10^{-6}), for all priority toxic pollutants regulated as carcinogens. The CTR also provides a schedule of compliance not to exceed 5 years from the date of permit renewal for an existing discharger if the Discharger demonstrates that it is infeasible to promptly comply with effluent limitations derived from the CTR criteria.
- F. On March 2, 2000, State Board adopted the *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (State Implementation Policy or SIP). The SIP was effective on April 28, 2000, with respect to the priority pollutant criteria promulgated for California by the U.S. EPA through National Toxics Rule (NTR) and to the priority pollutant objectives established by the Regional Boards in their basin plans, with the exception of the provision on alternate test procedures for individual discharges that have been approved by the U.S. EPA Regional Administrator. The alternate test procedures provision was effective on May 22, 2000. The SIP was effective on May 18, 2000, with respect to the priority pollutant criteria promulgated by the U.S. EPA through the CTR. The SIP requires the dischargers' submittal of data sufficient to conduct the determination of priority pollutants requiring water quality-based effluent limitations (WQBELs) and to calculate the effluent limitations. The CTR criteria for saltwater or human health for consumption of organisms, whichever is more stringent, are used to develop the effluent limitations in this permit to protect the beneficial uses of the King Harbor.
- G. 40 CFR section 122.44(d)(1)(vi)(A) requires the establishment of numeric effluent limitations to attain and maintain applicable narrative water quality criteria to protect the designated beneficial uses. Where numeric water quality objectives have not been established in the Basin Plan, 40 CFR section 122.44(d) specifies that WQBELs may be set based on U.S. EPA criteria and supplemented, where necessary, by other

relevant information to attain and maintain narrative water quality criteria to fully protect designated beneficial uses.

- H. State and Federal antibacksliding and antidegradation policies require that Regional Board actions to protect the water quality of a water body and to ensure that the waterbody will not be further degraded. The antibacksliding provisions are specified in sections 402(o) and 303(d)(4) of the CWA and in the Title 40 of the Code of Federal Regulations (40 CFR), section 122.44(l). Those provisions require a reissued permit to be as stringent as the previous permit with some exceptions where effluent limitations may be relaxed.
- I. Effluent limitations are established in accordance with sections 301, 304, 306, and 307 of the federal CWA, and amendments thereto. These requirements, as they are met, will maintain and protect the beneficial uses of King Harbor.
- J. Existing waste discharge requirements contained in Board Order No. 99-057, adopted by the Regional Board on June 30, 1999. In some cases, permit conditions (effluent limitations and other special conditions) established in the existing waste discharge requirements have been carried over to this permit.

V. Regulatory Basis for Effluent Limitations

The CWA requires point source discharges to control the amount of conventional, nonconventional, and toxic pollutants that are discharged into the waters of the United States. The control of the discharge of pollutants is established through NPDES permits that contain effluent limitations and standards. The CWA establishes two principal bases for effluent limitations. First, dischargers are required to meet technology-based effluent limitations that reflect the best controls available considering costs and economic impact. Second, they are required to meet WQBELs that are developed to protect applicable designated uses of the receiving water.

The CWA requires that technology-based effluent limitations be established based on several levels of control:

- A. Best practicable treatment control technology (BPT) is based on the average of the best performance by plants within an industrial category or subcategory. BPT standards apply to toxic, conventional, and nonconventional pollutants.
- B. Best available technology economically achievable (BAT) represents the best existing performance of treatment technologies that are economically achievable within an industrial point source category. BAT standards apply to toxic and nonconventional pollutants.

- C. Best conventional pollutant control technology (BCT) is a standard for the control from existing industrial point sources of conventional pollutants including BOD, TSS, fecal coliform, pH, and oil and grease. The BCT standard is established after considering the “cost reasonableness” of the relationship between the cost of attaining a reduction in effluent discharge and the benefits that would result, and also the cost effectiveness of additional industrial treatment beyond BPT.
- D. New source performance standards (NSPS) that represent the best available demonstrated control technology standards. The intent of NSPS guidelines is to set limitations that represent state-of-the-art treatment technology for new sources.

The CWA requires EPA to develop effluent limitations, guidelines and standards (ELGs) representing application of BPT, BCT, BAT, and NSPS. Section 402(a)(1) of the CWA and 40 CFR 125.3 of the NPDES regulations authorize the use of Best Professional Judgment (BPJ) to derive technology-based effluent limitations on a case-by-case basis where ELGs are not available for certain industrial categories and/or pollutants of concern.

If a reasonable potential exists for pollutants in a discharge to exceed water quality standards, WQBELs are also required under 40 CFR 122.44(d)(1)(i). WQBELs are established after determining that technology-based limitations are not stringent enough to ensure that state water quality standards are met for the receiving water. WQBELs are based on the designated use of the receiving water, water quality criteria necessary to support the designated uses, and the state’s antidegradation policy. For discharges to inland surface waters, enclosed bays, and estuaries, the SIP establishes specific implementation procedures for determining reasonable potential and establishing WQBELs for priority pollutant criteria promulgated by U.S. EPA through the CTR and NTR, as well as the Basin Plan.

There are several other specific factors affecting the development of limitations and requirements in the proposed permit. These are discussed as follows:

1. Pollutants of Concern

The CWA requires that any pollutant that may be discharged by a point source in quantities of concern must be regulated through an NPDES permit. Further, the NPDES regulations require regulation of any pollutant that (1) causes; (2) has the reasonable potential to cause; or (3) contributes to the exceedance of a receiving water quality criteria or objective.

Seaside Lagoon is a saltwater public swimming facility that is fed with non-contact cooling water from a nearby power plant. Effluent limitations for Discharge Serial No. 001 in the previous permit (No. 99-057) were established for temperature, pH, fecal coliform, total coliform, enterococcus, TSS, turbidity, BOD, oil and grease, and total residual chlorine. Lagoon water (dechlorinated saltwater from the swimming area)

may contribute solids and affect turbidity of the receiving water. Water discharged from swimming areas may contain substances that affect the biochemical oxygen demand and contribute oil and grease to the receiving water. Further, chlorine is added to the source water (i.e., non-contact cooling water from the AES power plant) prior to entering Seaside Lagoon. Although lagoon water is dechlorinated prior to discharge to King Harbor, chlorine may be present in residual concentrations in the lagoon water at the point of discharge. Coliform may be present in lagoon water due to the nature of the activity at Seaside Lagoon (i.e., humans swimming in, and animals in the vicinity of, the swimming area). Therefore, coliform bacteria is considered a pollutant of concern.

In addition, discharges of certain wastewaters may cause changes in the pH and temperature of the receiving water. Discharges of swimming lagoon water may affect the pH of receiving waters. Further, although temperature may not be a pollutant of concern in this discharge, consistent with Basin Plan requirements, the proposed permit also establishes effluent limitations for temperature.

2. Technology-Based Effluent Limitations

Due to the lack of national ELGs for discharges of water from swimming facilities and the absence of data available to apply BPJ to develop numeric effluent limitations, and pursuant to 40 CFR 122.44(k), the Regional Board will require the Discharger to develop and implement a *Best Management Practices Plan* (BMPP) which should include measures to prevent pollutants from entering the lagoon. The combination of the BMPP and existing permit limitations based on past performance and reflecting BPJ will serve as the equivalent of technology-based effluent limitations, in the absence of established ELGs, in order to carry out the purposes and intent of the CWA.

3. Water Quality-Based Effluent Limitations

As specified in 40 CFR section 122.44(d)(1)(i), permits are required to include WQBELs for toxic pollutants (including toxicity) that are or may be discharged at levels which cause, have reasonable potential to cause, or contribute to an excursion above any state water quality standard. The process for determining reasonable potential and calculating WQBELs when necessary is intended to protect the designated uses for the receiving water as specified in the Basin Plan, and achieve applicable water quality objectives and criteria (that are contained in other state plans and policies, or U.S. EPA water quality criteria contained in the CTR and NTR). The procedures for determining reasonable potential, and if necessary for calculating WQBELs, are contained in the SIP.

The CTR contains both saltwater and freshwater criteria. According to 40 CFR section 131.38(c)(3), freshwater criteria apply at salinities of 1 part per thousand (ppt) and below at locations where this occurs 95 percent or more of the time; saltwater

criteria apply at salinities of 10 ppt and above at locations where this occurs 95 percent or more of the time; and at salinities between 1 and 10 ppt the more stringent of the two apply. The CTR criteria for saltwater or human health for consumption of organisms, whichever is more stringent, are used to prescribe the effluent limitations in this permit to protect the beneficial uses of the King Harbor.

a. *Reasonable Potential Analysis (RPA)*

The Regional Board will conduct a reasonable potential analysis for each priority pollutant with an applicable criterion or objective to determine if a WQBEL is required in the permit. The Regional Board would analyze effluent data to determine if a pollutant in a discharge has a reasonable potential to cause or contribute to an excursion above a state water quality standard. For all parameters that have a reasonable potential, numeric WQBELs are required. The RPA considers water quality objectives outlined in the CTR, NTR, as well as the Basin Plan. To conduct the RPA, the Regional Board must identify the maximum observed effluent concentration (MEC) for each pollutant, based on data provided by the Discharger.

Section 1.3 of the SIP provides the procedures for determining reasonable potential to exceed applicable water quality criteria and objectives. The SIP specifies three triggers to complete a RPA:

- i. Trigger 1 – If the MEC is greater than or equal to the CTR water quality criteria or applicable objective (C), a limitation is needed.
- ii. Trigger 2 – If $MEC < C$ and background water quality (B) $> C$, a limitation is needed.
- iii. Trigger 3 – If other related information such as CWA 303(d) listing for a pollutant, discharge type, compliance history, etc. indicates that a WQBEL is required.

Sufficient effluent and ambient data are needed to conduct a complete RPA. If data are not sufficient, the Discharger will be required to gather the appropriate data for the Regional Board to conduct the RPA. Upon review of the data, and if the Regional Board determines that WQBELs are needed to protect the beneficial uses, the permit will be reopened for appropriate modification.

The Discharger reports that no CTR sampling has been conducted and there were no priority pollutant monitoring data available for review. Based on a lack of data to conduct an RPA, the Discharger is required to gather the appropriate CTR data to conduct an RPA as described in the proposed *MRP* CI-8034. The Regional Board reserves the right to reopen the permit at anytime for

amendment based on the analysis of these data.

b. Calculating WQBELs

If a reasonable potential exists to exceed applicable water quality criteria or objectives, then a WQBEL must be established in accordance with one of three procedures contained in Section 1.4 of the SIP. These procedures include:

- i. If applicable and available, use of the wasteload allocation (WLA) established as part of a total maximum daily load (TMDL).
- ii. Use of a steady-state model to derive maximum daily effluent limitations (MDELs) and average monthly effluent limitations (AMELs).
- iii. Where sufficient effluent and receiving water data exist, use of a dynamic model which has been approved by the Regional Board.

c. Impaired Water Bodies in 303 (d) List

Section 303(d) of the CWA requires states to identify specific water bodies where water quality standards are not expected to be met after implementation of technology-based effluent limitations on point sources. For all 303(d)-listed water bodies and pollutants, the Regional Board plans to develop and adopt TMDLs that will specify WLAs for point sources and load allocations (LAs) for non-point sources, as appropriate.

The U. S. EPA has approved the State's 303(d) list of impaired water bodies. Certain receiving waters in the Los Angeles and Ventura County watersheds do not fully support beneficial uses and therefore have been classified as impaired on the 2002 303(d) list and have been scheduled for TMDL development. However, the 2002 State Board's California 303(d) List does not classify King Harbor as impaired.

d. Whole Effluent Toxicity

Whole effluent toxicity (WET) protects the receiving water quality from the aggregate toxic effect of a mixture of pollutants in the effluent. WET tests measure the degree of response of exposed aquatic test organisms to an effluent. The WET approach allows for protection of the narrative "no toxics in toxic amounts" criterion while implementing numeric criteria for toxicity. There are two types of WET tests: acute and chronic. An acute toxicity test is conducted over short time period and measures mortality. A chronic toxicity test is conducted over a longer period of time and measures mortality, reproduction, and growth.

The Basin Plan specifies a narrative objective for toxicity, requiring that all waters be maintained free of toxic substances in concentrations that are lethal to or produce other detrimental response on aquatic organisms. Detrimental response includes but is not limited to decreased growth rate, decreased reproductive success of resident or indicator species, and/or significant alterations in population, community ecology, or receiving water biota. The existing permit does not contain acute toxicity limitations or monitoring requirements.

In accordance with the Basin Plan, acute toxicity limitations dictate that the average survival in undiluted effluent for any three consecutive 96-hour static or continuous flow bioassay tests shall be at least 90%, with no single test having less than 70% survival. Consistent with Basin Plan requirements, this permit establishes acute toxicity limitations.

In addition to the Basin Plan requirements, Section 4 of the SIP states that a chronic toxicity effluent limitation is required in permits for all discharges that will cause, have the reasonable potential to cause, or contribute to chronic toxicity in receiving waters. Based on the fact that the discharge is dechlorinated once-through, non-contact cooling water originating from the lagoon, and chlorine dissipates rapidly, the Regional Board does not believe the lagoon water discharge will contribute to chronic toxicity. Thus, no chronic toxicity limitations or monitoring requirements have been established in this proposed permit, and the Discharger is required to comply with acute toxicity limitations established in the proposed permit.

4. Specific Rationale for Each Numerical Effluent Limitation

Section 402(o) of the Clean Water Act and 40 CFR section 122.44(l) require that effluent limitations standards or conditions in reissued permits be at least as stringent as those in the existing permit. The Regional Board has determined that reasonable potential exists for the conventional and nonconventional pollutants that are regulated under the current permit; therefore, effluent limitations have been established for these pollutants. The requirements in the proposed permit for TSS, BOD, oil and grease, turbidity, Fecal Coliform, Total Coliform, Enterococcus, and total residual chlorine (shown in the table below) are based on limitations specified in the City's existing permit. The effluent limitations for pH and acute toxicity are based on the Basin Plan. The effluent limitation for temperature is based on the Thermal Plan.

Because there are no data to perform the RPA and calculate WQBELs for the priority pollutants, this permit does not establish effluent limitations for priority pollutants.

Effluent limitations are established in this permit, which are applicable to discharges of lagoon water from the NPDES Discharge Serial No. 001 (Latitude 33° 50' 38" N; Longitude 118° 23' 47" W) into King Harbor.

Pollutant	Units	Monthly Average Effluent Limitations	Daily Maximum Effluent Limitations	Rationale ¹
Temperature	°F	86		TP
pH	S.U.	6.5 – 8.5		BP
Total Suspended Solids	mg/L	50	75	E
BOD ₅ @20 °C	mg/L	20	30	E
Oil and Grease	mg/L	10	15	E
Turbidity	NTU	50	75	E
Total Coliform	mpn/100 ml	1000	10,000	E, BP
Fecal Coliform	mpn/100 ml	200	400	E, BP
Enterococcus	mpn/100 ml	35	104	BP
Total Residual Chlorine ⁶	µg/L	2	8	E
Acute Toxicity	% Survival	2		BP

1. TP – Thermal Plan; BP – Limitations are established in the Basin Plan; CTR, SIP – Water quality-based effluent limitations established based on the procedures in the SIP; E – Existing permit limitation.
2. For any three consecutive 96-hour static or continuous flow bioassay tests must be at least 90%, with no single test producing less than 70% survival (more information can be found in Section I.B.3.a. of the tentative permit.)

5. Monitoring Requirements

The previous *MRP* No. CI-8034 for Seaside Lagoon, required daily monitoring for total flow; weekly monitoring for residual chlorine, fecal coliform, total coliform, and enterococcus; monthly monitoring for TSS and turbidity; and annual monitoring for temperature, pH, oil and grease, and BOD during the period of operation from June through September.

Monitoring requirements are discussed in greater detail in Section III of the *MRP* No. CI-8034. As described in the *MRP*, monitoring reports must be submitted quarterly.

A *Effluent Monitoring*

To demonstrate compliance with effluent limitations established in the permit, and to assess the impact of the discharge to the beneficial uses of the receiving waters, this permit carries over the existing monitoring requirements for most parameters. Monitoring will include daily monitoring for total flow; weekly

monitoring for residual chlorine, Fecal Coliform, Total Coliform, and Enterococcus; monthly monitoring for TSS and turbidity; and annual monitoring for temperature, pH, oil and grease, and BOD.

The proposed permit also establishes annual monitoring for acute toxicity. Further, to provide sufficient data to conduct an RPA in the future, annual monitoring requirements for priority pollutants have been established in this permit.

The effluent monitoring program for the discharge of lagoon water (dechlorinated saltwater) from Discharge Serial No. 001 (Latitude 33° 50' 38" N and Longitude 118° 23' 47" W) is provided in Section III of the *MRP*.

b. Receiving Water Monitoring

The Discharger is required to monitor the receiving water for the CTR priority pollutants, to determine reasonable potential. Pursuant to the California Water Code, section 13267, the Discharger is required to submit data sufficient for: (1) determining if WQBELs for priority pollutants are required, and (2) to calculate effluent limitations, if required. The SIP requires that the data be provided. Therefore, the Discharger shall conduct the following monitoring program for the receiving water for all CTR priority pollutants. The results of monitoring for reasonable potential determination shall be submitted in accordance with Section I.A of the *MRP*. Receiving water sampling shall be conducted at the same time as the effluent sampling. The receiving water monitoring location shall be outside the influence of the discharge in the receiving water (King Harbor).

Monitoring requirements for receiving water are discussed in greater detail in Section V and VI of the *MRP*.

c. *Monitoring for Reasonable Potential Determination*

The SIP states that the Regional Board will require periodic monitoring for pollutants for which criteria or objectives apply and for which no effluent limitations have been established.

The Regional Board is requiring, as part of the *MRP*, that the Discharger conduct annual effluent monitoring for the priority pollutants (except for 2,3,7,8-TCDD) for which there are no effluent limitations established in the permit. In addition, the Regional Board is requiring that the Discharger conduct receiving water monitoring for the priority pollutants, annually, and at the same time effluent samples are collected. Further, the Discharger must analyze pH, salinity, and hardness of the receiving water concurrent with the analysis for the priority pollutants.

This monitoring shall occur at the following locations:

- Effluent discharge point (Discharge Serial No. 001) prior to entry into receiving water (King Harbor); and
- Receiving water. The monitoring station shall be 50 feet from the discharge point into the receiving water, outside the influence of the discharge.

The required monitoring frequency and type of sample for pH, hardness, salinity, and toxic pollutants are listed in Section VIII of the *MRP*.

The Regional Board is requiring, as part of the *MRP*, that the Discharger conduct effluent and receiving water monitoring for 2,3,7,8 TCDD, twice during the permit term (once during the 2nd year of the permit and once during the 4th year) of the permit term. The SIP requires monitoring for 2,3,7,8-TCDD and the 17 congeners listed in the table provided in the *MRP*. The Discharger is required to calculate Toxic Equivalence (TEQ) for each congener by multiplying its analytical concentration by the appropriate Toxicity Equivalence Factors (TEF) provided in the *MRP*.